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NICHOLAS A. VONNEUMAN

Conditionally Exclusive Patent Rights and the Patent Clause of the Constitution

I

A PATENT FOR INVENTION ENTITLES the patentee to a monopoly, and thus it may become the source of monopolistic practices and, in extreme cases, of violations of the antitrust laws. This paradoxical situation has many implications,[1] frequently involving the question whether the patentee, consistently with the privilege which he has been granted, should be allowed to withhold his patent from actual utilization. It is a general feature of the patent concept, that in exchange for protection the patentee is required to disclose the invention so that upon expiration of the term of the patent it enters the public domain. This occurs, even if the patent is not exploited during its term. Nonuser nevertheless affects the public interest. It may be a means of restraining competition, especially when related patents are acquired from the original patentees and pooled in one hand. But even without considering the antitrust aspects, nonuser may deprive the public of the benefits of an invention and of the advantages that might result from its further improvement. Of course, the public would not have had these benefits at all if the inventor had elected to keep his invention secret without applying for a patent.[2] But in that case, there would have been opportunity for another independent inventor to obtain a patent for the same discovery and to exploit it. For these reasons, from the functional point of view of a rational patent policy, nonuser is not in the public interest. This principle is usually expressed in patent statutes by provisions for compulsory licensing or revocation of the patent in the event of unjustified failure to utilize it.

The patent laws of the United States[3] are silent on this subject, and thus no sanction attaches to nonuser. The principle that the grant of a

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[1] For a comprehensive analysis of this subject, see S. C. Oppenheim, "Patents and antitrust: peaceful coexistence?" 54 Mich. Law Rev. (1955) 199.

[2] For a discussion of the potential effect of suppression by "big business" or keeping an invention secret by the inventor, see William J. Getty, Jr., "The Truth about a 215-Mile Carburetor," 36 JPOS (1954) 544.

[3] 35 U.S.C. (1952).

patent is contingent upon exploitation is itself highly controversial and subject to continuing dispute. One basic argument turns upon the interpretation of the patent and copyright clause of the Constitution,[4] involving the question whether the exclusive right therein granted is conditionally or unconditionally exclusive.[5]

Opponents of the principle maintain that it would violate the constitutional provision, which is the basic source for granting ". . . to authors and inventors the *exclusive* right to their respective writings and discoveries" (emphasis added). Accordingly, the constitutional provision is deemed an absolute directive under which only *unconditionally exclusive* patent rights may be granted; any sanction for nonuser would render this right conditionally exclusive in violation of the Constitution. This argument has prevailed in Congress whenever any proposal has been made—and defeated—to introduce provision for compulsory licensing in the Patent Act as a sanction for nonuser.[6] This argument does not prevent conditions to be attached to the issuance of the patent; the applicant may be required to fulfill certain requirements before the patent issues. But once the patent is issued, the right attached thereto must be unconditionally exclusive.

Proponents of the principle maintain that the portion of the constitutional provision referring to "the exclusive right" should not be read out of context, but should be analyzed merely as one aspect of the entire clause, which grants Congress the power ". . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Accordingly, it is submitted that the primary end of the constitutional provision is the promotion of science and useful arts, under which the *exclusive* right is a maximum limitation and as such may be interpreted as *conditionally exclusive*.

The idea that primary emphasis should be placed on the first part of the constitutional provision in determining its principal purpose ("To promote the progress of science and useful arts") is supported by many

[4] Art. I. Sec. 8(8).

[5] For discussions taking either side of the question, see: Karl Flemming, "The Origin of the Patent and Copyright Clause of the Constitution," 17 Geo. L. J. (1929) 109; F. I. Schechter, "Would Compulsory Licensing of Patents be Unconstitutional?" 22 Va. L. Rev. (1936) 287; "Constitutionality of the Patent Provision of the 1954 Atomic Energy Act, 22 U. Chi. L. Rev. (1955) 920; W. W. Beckett and R. M. Merriam, "Will the Patent Provisions of the Atomic Energy Act of 1954 Promote Progress of Stifle Invention?" 23 Geo. Wash. L. Rev. (1954) 195; W. E. Wyss and R. R. Brainard, "Compulsory Licensing of Patents," 6 Geo. Wash. L. Rev. (1938) 499.

[6] For references to congressional hearings and debates, see publications cited in preceding footnote.

authorities, although they do not necessarily draw therefrom any explicit conclusion regarding the general interpretation of exclusive rights. The Attorney General's National Committee to Study Antitrust Laws[7] defines the basic nature of the patent grant, relying on judicial decisions, as follows: "Since Pennock v. Dialogue, 2 Pet. 1 (7 L.Ed. 327), was decided in 1829, this court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes of the owners of patents, but is 'to promote the progress of science and useful arts' "[8] or ". . . the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."[9] The general approach of the Temporary National Economic Committee,[10] which actually recommended the incorporation of compulsory licensing provisions in the patent law, followed the same line: ". . . the privilege given [by the patent] has not been used, as was intended by the framers of the Constitution and by the Congress 'to promote the progress of science and the useful arts,' but rather for purposes completely at variance with that high ideal[11] . . . There should be a further prohibition against any other restriction [of licenses] which would tend substantially to lessen competition or to create a monopoly, unless such restriction is necessary to promote the progress of science and the useful arts."[12] A recent report of the Senate Subcommittee on Patents, recognizing the need for basic changes in our patent system, concludes in the same spirit:

"The genius of the architects of our patent system, like the genius of those who framed our Constitution, to some extent anticipated these basic shifts and built a structure that was adaptable to them and sufficiently flexible and far-

[7] Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), Chapter V, pp. 223–260.

[8] *Id.*, p. 24, quoting Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). The reference to Pennock v. Dialogue, 2 Pet. 1 (1829) is at 19:

"While one great object was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main object was 'to promote the progress of science and useful arts'; and this could be done best, by giving the public at large a right to make, construct, use and vend the thing invented, at as early a period as possible, having a due regard to the rights of the inventor."

[9] *Id.*, at 224, quoting Kendall v. Winsor, 21 How. 322 (U.S. 1858).

[10] Final Report and Recommendations of the Temporary National Economic Committee, Senate Doc. No. 35, 77th Cong., 1st Sess. (1941).

[11] *Id.*, at p. 36.

[12] *Id.*, at p. 37.

reaching in its underlying principles as to be able, with an occasional patching here and a shoring there, to weather these changes and continue to carry out with maximum effectiveness the constitutional purpose of 'promoting the progress of science and useful arts.' One cannot, however, question the desirability of an inquiry, as suggested by Judge Hand, to determine to what extent this is so and, even where it is so, to ascertain what patching or refurbishing may be desirable if the patent system is to perform even better in today's society."[13]

Although attempts to introduce compulsory licensing provisions in the Patent Act as sanctions for nonuser have failed thus far, partly because of the argument that such provisions would result in conditionally exclusive patent rights in violation of the Constitution, compulsory licensing or equivalent provisions do appear in our Copyright Law[14] and in the Atomic Energy Acts of 1946[15] and 1954.[16] The provisions in the Copyright Law are designed to prevent the creation of a mechanical-music trust, while those in the Atomic Energy Acts are designed to secure the utilization of certain inventions in the public interest and to prevent the creation of a monopoly in the hands of the relatively few companies which act as government contractors. Also significant from this point of view are the provisions of a federal statute which relieve government contractors from liability for patent infringement in case, when so required by the terms of their contract with the government, they utilize a patent without license or authorization, and give the patent owner a remedy in the Court of Claims to recover compensation from the United States.[17] These provisions are not sanctions for nonuser, but result nonetheless in conditionally exclusive rights in conflict with the strict in-

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[13] Review of the American Patent System. Report of the Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights. Senate Report No. 1464, 84th Cong., 2d Sess. (1956) p. 16.

[14] 17 U.S.C. (originally Act of March 4, 1909), Sec. 1(e):

"And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon payment to the copyright proprietor . . ."

[15] Pub. L. 585, 79th Cong., 2d Sess. (August 1, 1946), Sec. 11.

[16] Pub. L. 703, 83rd Cong., 2d Sess. (August 30, 1954), Chapter 13.

[17] 28 U.S.C. 1498:

"Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture . . ."

terpretation of the "exclusive" term of the constitutional provision; they have not as yet been tested by the Supreme Court.

Since there is a certain similarity between the principles affecting the protection of trademarks and patents respectively, it should be noted that under the Trademark Act[18] protection is conditioned on actual utilization as a prerequisite, and rights acquired in a trademark may be lost in the event of nonuser. This, however, does not serve as an argument in the controversy concerning exclusive patent rights, since trademark protection is not derived from the patent and copyright clause of the Constitution.

The Supreme Court has upheld invasions of exclusive patent rights and application of compulsory licensing or other sanctions only in the event of actual violations of the antitrust laws and only to the extent required in order to put an end to such abuse of monopoly. Beyond this, the highest tribunal has confirmed repeatedly the patent owner's right to withhold the patent from use or licensing and has declared with equal emphasis that nonuser in itself does not violate any existing law, and that under the existing patent law failure to utilize a patent is not subject to sanctions.

This attitude is clearly reflected in the *Paper Bag* case.[19] Albert H. Walker in his brief eloquently defended the rational patent philosophy which calls for sanctions in the event of unjustified nonuser:

"The owner of any patent who, beginning with the granting of that patent, long and always unreasonably holds in nonuse the invention covered thereby, is not equitably entitled to a writ of injunction to enable him to prevent others from introducing that invention into use in the art to which it belongs, and thus causing it to promote the progress of that art. . ."[20]

The argument did not prevail and the Court held:

"The patent law is the execution of a policy having its first expression in the Constitution, and it may be supposed that all that was deemed necessary to accomplish and safeguard it must have been studied and provided for. It is worthy of note that all that has been deemed necessary for that purpose, through the experience of years, has been to provide for an exclusive right to inventors to make, use and vend their inventions. In other words, the language of complete monoply has been employed; . . ."[21]

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[18] Pub. L. 489, 79th Cong., 2d Sess. (July 5, 1946).
[19] Continental Paper Bag Co. v. Eastern Paper Co., 210 U.S. 405 (1907).
[20] *Id.*, at 407.
[21] *Id.*, at 423.

The Court also noted that Congress passed an Act in 1832 which extended patent protection to aliens, subject to the condition that the patent would be void if the patentee failed to introduce the invention in the United States or to keep it in public use within stated time limits. Congress repealed this law in 1836. The Court also stated that Congress must have been aware of the existence in other countries of the policy expressed in the repealed law affecting patent rights in the event of nonuser: "This policy, we must assume, Congress has not been ignorant of nor of its effects. It has, nevertheless, selected another policy; it has continued that policy through many years."[22]

Thus in the existing patent legislation, no sanction is attached to nonuser. *De lege ferenda*, the decisive factor in introducing compulsory licensing as a sanction in the event of nonuser will be the interpretation of the adjective "exclusive" in the constitutional provision. It is generally accepted that the authors of the Constitution deliberately refrained from using the words "patent" and "copyright" in order to prevent any future arbitrary interpretation restricted to one of the many meanings which these words had at that time. The authors of the Constitution did, however, use the adjective "exclusive" in their definition of the related rights. It may be assumed, therefore, that the meaning of the adjective "exclusive" as applied to these rights was not ambiguous at that time. It is the purpose of the following survey to analyze the general evolution of patent law and its terminology from its inception to the present time, in order to determine whether any qualification has been attached to "exclusive" throughout the evolution and especially at the end of the eighteenth century. This study is based mainly on sanctions for nonuser attached as conditions to the "exclusive right." Although conditions limiting the "exclusive right" appear occasionally also in the form of provisions restricting the patentee's right in the case of food or pharmaceutical patents, or for the sake of national security or other public interest, their appearance is not sufficiently consistent to permit the observation of a continuous evolutionary trend.

It is not our purpose to pass on the desirability of legislation, but to analyze one aspect only of the constitutional question. Nor is it sought to present a comprehensive survey of the patent systems of all countries with an evaluation of the controversial issue involved here; in line with our basic purpose as outlined in the previous paragraph, the patent systems reviewed have been selected whether because they lend themselves readily for analysis of the general evolution of the conditionally

[22] *Id.*, at 429.

exclusive patent right concept or because they represent a fair sample of the present stage of this evolution.

II

Patents for invention trace their origin to the trade monopolies or privileges established in Europe generally since the Middle Ages by individual grants in the form of letters patent issued under the prerogative of the sovereign. Their purpose was the establishment or protection of commerce and crafts, and thus the requirement for actual practicing of the grant was usually implied or expressed. The encouragement of new inventions evolved only gradually as a specific purpose of these grants, equally subject to the principle of requiring actual utilization.

In England, these grants were based on the general rule of the common law that restraint of trade is evil and monopolies should be granted only if public benefit ensues which outweighs the disadvantages of restraint. By the 14th and 15th centuries, industrial patent grants given as a prerogative of the Crown were well developed. They explicitly sought to promote the introduction from abroad of new crafts and usually included a provision that the new craft must be actually established and worked to a certain extent or else the grant would be void.[23] The earliest authenticated instance of such a grant is the letter of protection of 1331 issued in favor of John Kempe of Flanders, which contained a general promise of similar privileges to foreign weavers, dyers, and fullers on condition that they settle in the country and teach their art to those willing to be instructed therein.[24] A grant of 1561 for the manufacture of soap requires that at least two of the patentee's servants be of native birth and that the products be submitted for inspection by the municipal authorities; upon proof of defective manufacture the grant would be cancelled.[25] A grant of 1586 for a procedure to work oil out of woolen cloth requires that instruction in that art be given to any member of the public for a reasonable recompense.[26] The requirement that the new art actually be taught is also expressed in general provisions regulating employment of apprentices and their efficient education, which are contained in many

[23] For history of the early European and English patent systems, see P. J. Frederico, "The Origin and Early History of Patents," 11 JPOS (1929) 292; E. W. Hulme, "The History of the English Patent System," in 3 Select Essays in Anglo-American Legal History (1909); A. Wood Renton (Editor), 9 Encyclopaedia of the Laws of England (1896) 515.

[24] E. W. Hulme, "The History of the Patent System under the Prerogative and at Common Law," 12 Law Quarterly Review (1896) 141.

[25] *Id.*, at 145.

[26] *Id.*, "The History of the Patent System under the Prerogative and at Common Law. A Sequel," 16 Law Quarterly Review (1900) 48.

grants to foreigners in order to secure the continuity of the particular art in case of the original grantee's withdrawal.[27] Another type of requirement for actual utilization is expressed in a grant of 1571 for an engine for land drainage and water supply, issued with the condition that it should be void unless the engine is erected within two years or if it should not prove to work efficiently.[28]

The first significant statutory confirmation of the royal prerogative for granting patents or privileges to inventors of new manufacture is found in the Statute of Monopolies of 1623,[29] containing the provision that such patents should not be "contrary to the Law, nor mischievous to the State, by raising of the prices of Commodities at home, or hurt of Trade, or generally inconvenient." The first statutory provision for a modern patent system with compulsory licensing to prevent abuses of monopoly was included in the Patent Act of 1883.[30] Under this Act, compulsory licenses may be granted to interested parties against appropriate compensation for any of the following three reasons, resulting from the patentee's failure to grant voluntary licenses on reasonable terms: (1) the patent is not being worked in the United Kingdom, (2) reasonable requirements of the public with respect to the invention can not be supplied, and (3) working or using another invention is prevented. The Patents Act of 1902[31] added the provision for revocation of the patent if the compulsory license is not adequate to meet the public requirements. Such revocation, however, could not take place before the expiration of three years after the patent grant. The Patents Acts of 1907 to 1946 retain the provision that interested persons may petition for compulsory license or revocation,[32] introduce a three-year grace period for nonuser before granting a compulsory license,[33] and explicitly confirm the patentee's basic obligation to use his patent by stating that in determining whether there has been any abuse of monopoly rights "it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in the United Kingdom without undue delay."[34] The present Patents Act

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[27] *Id.*, "On the Consideration of the Patent Grant, Past and Present," 13 Law Quarterly Review (1897) 314.

[28] *Id.*, "The History of the Patent System under the Prerogative and at Common Law. A Sequel," 16 Law Quarterly Review (1900) 45.

[29] 21 Jac. I, c. 3.

[30] 46 & 47 Vict., c. 57, Sec. 22.

[31] 2 Edw. 7, c. 34, Sec. 3.

[32] 7 Edw. 7, c. 29, Sec. 24.

[33] 18 Geo. 5, c. 2, Sec. 2.

[34] 9 & 10 Geo. 5, c. 80, Sec. 1.

of 1949[35] retains the emphasis placed on the fullest use of the patented invention, and provides in more detail that three years after granting the patent interested persons may apply for compulsory license for any one of the following reasons:

(a) The patented invention, being capable of being commercially worked in the United Kingdom, is not being commercially worked therein or is not being so worked to the fullest extent that is reasonably practicable;

(b) Demand for the patented article in the United Kingdom is not being met on reasonable terms, or is being met to a substantial extent by importation;

(c) Commercial working of the invention in the United Kingdom is being prevented or hindered by the importation of the patented article;

(d) By reason of the refusal of the patentee to grant a license or licenses on reasonable terms, (i) a market for the exportation of the patented article manufactured in the United Kingdom is not being supplied, or (ii) the working or efficient working in the United Kingdom of any other patented invention which makes a substantial contribution to the art is prevented or hindered, or (iii) the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced;

(e) By reasons of conditions imposed by the patentee upon the grant of licenses under the patent, or upon the purchase, hire, or use of the patented article or process, the manufacture, use, or sale of materials not protected by the patent, or the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced. Provisions are also included in this Act to extend the time for putting the patent into operation before applying the sanctions. Revocation of the patent, not before two years have elapsed after granting the compulsory license, is also possible if the aim of the compulsory license is not achieved; revocation may be unconditional or subject to time limits or other conditions.[36]

Substantially similar developments took place contemporaneously also in colonial America and in the post-revolutionary period before the patent clause of the Constitution was generally applied. Individual patent grants for inventions usually included the requirement that the patent be exercised.[37] The most significant general law was the South

[35] 12, 13 & 14 Geo. 6, c. 87.

[36] *Id.*, Sec. 37, 42.

[37] For the history of early American patents, see P. J. Frederico, "Colonial Monopolies and Patents," 11 JPOS (1929) 358 and "State Patents," 13 JPOS (1931) 166; F. I. Schechter *op. cit. supra, n. 5.*

Carolina Act of 1784, which established compulsory licensing in the event of failure of a copyright owner to publish copyrighted material, and extended this principle in general terms also to patents for inventions or useful machines; in 1788, the same legislature granted an "exclusive" patent right for a machine, with the provision that upon payment of an appropriate fee any person be granted the license and permission to build the machine.[38]

The patent law of Canada is similar to the British law of 1949, providing for compulsory licenses three years after the grant if there has been an abuse of the exclusive right with the same basic explanation: "in determining abuse, it shall be taken that patents for new invention are granted not only to encourage invention, but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay."[39] Similar provisions for compulsory licenses with appropriate safeguards, based on the principle requiring working on a commercial scale and satisfying the reasonable requirements of the public, are incorporated also in the patent laws of Australia[40] and of the Union of South Africa.[41]

In France, the modern patent system—as distinguished from individual patent grants based on the royal prerogative—was established by the Patent Act of January, 1791,[42] which assures inventors the equivalent of exclusive rights (*la pleine et entière jouissance*) subject to certain conditions, such as the requirement of utilization: if the patentee fails without good reason to put his patent to active use within two years, the patent will be cancelled.[43] This principle is retained in the Patent Act of 1844[44] which adds nonuser for any consecutive period of two years as a reason for cancellation. Compulsory licensing as a sanction for nonuser was not introduced until 1953[45]. The patent is now subject to compulsory license if the patentee fails without good reason for three years after the grant or for any consecutive three-year period thereafter, to work his patent in good faith and efficiently, directly or through a licensee.[46]

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[38] F. I. Schechter, *ibid.*, 306.

[39] Patent Act of 1935 (Revised Statutes of Canada 1952, Chapter 203) Sec. 67–68.

[40] Act. No. 42 of 1952, Sec. 108–110.

[41] Act. No. 37 of 1952, Sec. 48–50.

[42] Lois et Actes du Gouvernement, Vol. II, p. 314.

[43] *Id.*, Sec. 16(4): "Tout inventeur qui, dans l'espace de deux ans, à compter de la date de sa patente, n'aura point mis sa découverte en activité et qui n'aura point justifié les raisons, sera déchu de sa patente."

[44] Bulletin de Lois, 1844 No. 108, Art. 32(2).

[45] Décret No. 53–970 du 30 Septembre 1953.

[46] *Id.*, Art. 2: "Tout brevet d'invention delivré depuis plus de trois ans dont, sans excuse valable, le titulaire n'a pas entrepris l'exploitation sérieuse et effective, personnellement ou

In Austria, individual industrial monopolies or privileges (*Privilegien*) granted by imperial prerogative were used in the 16th and 17th centuries for the specific purpose of establishing factories or industries. By the 18th century these grants covered also specific inventions. Their main purpose was to serve the public welfare, and accordingly these grants included sanctions for nonuser, declaring the grant void if not practiced within a specified period of time.[47] This sanction was explicitly confirmed in the first statutory provision which deals with the imperial prerogative, the Decree of January 22, 1810.[48] As implied also in the title of this Decree (*Ertheilung ausschliessender Privilegien*), it provides for grants of exclusive rights. These rights are explicitly subject to the condition that was attached to them throughout the past, i.e., that the grants must be practiced without remaining unutilized for any one year or else be cancelled; and each grant must also contain a provision determining the deadline before actual utilization must begin.[49] While this Decree refers only to machines and inventions, the next Decree of December 8, 1820,[50] extended the field of grants generally to inventions and improvements in industry, introduced a firm deadline of one year after the grant before the requirement of utilization must be satisfied, and invoked the sanction of cancellation only if the grantee had no justifiable reason for his inaction. These principles were retained in the subsequent Acts of 1832[51] and of 1852,[52] the latter of which changed the condition of cancellation (if the grant was not practiced without good reason for one year) to two years nonuser without allowing for the excuse of good reasons. The first statutory provision which establishes patent rights as a matter of law—as distinguished from grants under the imperial prerogative—and uses the definition of patents for invention (*Erfindungspatente*), is the Patent Act of 1897.[53] This is also the first to provide for compulsory licenses, if after three years the patent

par l'intermédiaire d'un licencié, peut faire l'objet d'une demande de licence dite licence obligatoire; il en est de même du brevet dont l'exploitation aura été abandonnée depuis plus de trois ans . . ."

[47] For early history of Austrian patent law, see Paul Ritter von Beck-Mannagetta, Das Österreichische Patentrecht (1893).

[48] Politische Gesetze und Verordnungen, Vol. 33, No. 10.

[49] *Id.*, Sec. 7(d): ". . . Die weitere seit den letzten Zeiten allen Privilegien eingeschaltete Bedingung, dass dasselbe ausgeübt und Während der Dauer des Privilegiums nie ein Jahr hindurch unbenützt bleiben, widrigen Falles aber erlöschen soll, sey beyzubehalten; auch habe die Festsetzung der Frist, binnen welcher dessen volle Ausübung anfangen müsse, bey jedem einzelnen Falle zu geschehen."

[50] Politische Gesetze und Verordnungen, Vol. 48, No. 148 (System bey Verleihung ausschliessender Privilegien auf Erfindungen und Verbesserungen in dem Gebiete der Industrie).

[51] Politische Gesetze und Verordnungen, Vol. 60, No. 31.

[52] Reichsgesetzblatt 1852, No. 184.

[53] Reichsgesetzblatt 1897, No. 30.

is required for the utilization of a subsequent improvement patent or is required in the public interest. The present law is the Patent Act of 1950[54] which provides for compulsory licenses three years after the patent is granted, if such patent is required for the utilization of a subsequent patent, or if the patentee has failed to utilize his patent to a reasonable extent within the country, directly or through licensees, or has failed to make arrangements enabling others to use the patent. This Act also provides for partial or full revocation of the patent if the invention is practiced exclusively or substantially abroad and the compulsory license has not resulted in domestic utilization. Revocation may take place only if two years have elapsed after granting the compulsory license and only if the patentee fails to prove that he could not have been reasonably expected to practice his invention to the required extent.

In Hungary, the statutory history of patent law begins with the Austrian Decree of 1820, which was adopted by the Hungarian legislature in 1840.[55] Since the autonomy of Hungary was suspended during the period between 1849 and 1867, the Austrian Act of 1852 became automatically effective in Hungary, although the validity of all Austrian legislation of that period was subsequently rejected by Hungary. When friendly relations were resumed between the two countries in 1867, temporary arrangements were made for the mutual protection of inventors on the basis of reciprocity, and the first independent Hungarian patent law was enacted in 1895.[56] It provided for partial or full revocation of the patent if it was not utilized within the country to a reasonable extent within three years after the grant. Compulsory licensing was introduced in 1932[57] with the following provisions: if the patent is not put to use within the country to a reasonable extent within three years after the grant and the patentee cannot justify his inaction, a compulsory license may be granted to any reliable applicant who previously asked the patentee for a voluntary license but was refused; the compulsory license is nonexclusive and may be granted with territorial limitations or with respect to specific patent claims only; the patent is subject to revocation two years after the compulsory license is granted, if the patent remains unutilized without good reason.

The present Hungarian patent law also exhibits the result of another evolutionary trend, peculiar to legal developments behind the Iron Curtain, i.e., the introduction of protection offered by the "author's

[54] Bundesgesetzblatt 1950, No. 128.
[55] Act XVIII of 1840.
[56] Act XXXVII of 1895.
[57] Act XVII of 1932.

certificate."[58] This protection is available as an alternative to the regular patent. The owner of the "author's certificate" is entitled to moral recognition and compensation, but loses control over the exploitation of his invention. This control is retained by the state, and the general policy reflected in the statute is to induce the inventor to apply for an "author's certificate" in preference to a regular patent and to provide a simpler and cheaper application procedure for the former. These provisions follow the patent law of the U.S.S.R. They represent the philosophy seeking to prevent the accumulation of and control by private capital; it does not aim to encourage private investment of capital in the exploitaton of inventions. Procedure for revoking or converting a regular patent becomes a relatively simple administrative procedure. Under this philosophy, the significance of "nonuser" as such is diminished, since the state may dispose of inventions by a simple *fiat*.[59]

The evolution of industrial monopolies in the German states followed substantially the general pattern, although detailed statutory provisions for the protection of inventions were not so abundant, presumably because the relationships between so many sovereign countries did not create an appropriate atmosphere for legislation of a type that could be effective only if applied to large territories. Nevertheless, the Federation of North German States confirmed in 1867 the existence of patents for inventions and provided for their protection on the basis of reciprocity.[60] The first statutory patent provision of the German Empire is the Patent Act of 1877,[61] which provides for revocation of the patent three years after its date if the patentee fails to put his patent to use to a reasonable extent within the country, or if he fails to make the necessary arrangements to enable others to use the patent, or if granting permission to others for the use of the patent is in the public interest and the patentee fails to grant such permission against reasonable compensation. Compulsory licensing was introduced in 1911,[62] and was retained by the Patent Act of 1936,[63] essentially in the form in which it is at present in force in Western Germany as republished by the Patent Act of 1953.[64] Compulsory licenses may now be granted three years after the original patent grant if such is in the public interest and if the patentee has refused to grant

[58] Decree No. 41/1953 M.T.

[59] For analysis and translation of the Soviet Patent Law of 1941, see Charles Prince, "The New Soviet Patent Law," 28 JPOS (1946) 261.

[60] Bundesgesetzblatt 1867, p. 81.

[61] Reichsgesetzblatt 1877, p. 501.

[62] Reichsgesetzblatt 1911, p. 243.

[63] Reichsgesetzblatt 1936-II, p. 117.

[64] Bundesgesetzblatt 1953-I, p. 623.

voluntary licenses on reasonable terms. Compulsory licenses may be granted in restricted form and subject to conditions. The patent may be revoked if practiced exclusively or substantially abroad; revocation may take place only two years after a compulsory license has been granted and only if the public interest can no longer be served by the compulsory license.[65]

The patent law of Eastern Germany,[66] in line with the evolution behind the Iron Curtain, follows the principles of the U.S.S.R. law. As an equivalent to the "author's certificate," the *Wirtschaftspatent* provides the simple and preferred form of acknowledging the inventor's right to moral recognition and compensation and places exploitation under control of the patent office. The regular patent protection is provided by the *Ausschliessungspatent*. The latter is not encouraged and, if acquired, the patentee is under moral obligation to convert it into a *Wirtschaftspatent*, if necessary in the interest of the public economy, or for social or cultural reasons.

The evolution of the sanctions for nonuser is also reflected in the International Conventions. Article 5 of the original Convention of 1883 merely provides that if patented articles are introduced into another convention country, "the patentee remains subject to the obligation to exploit his patent in conformity with the laws of the land in which he introduces the patented articles."[67] The 1911 Convention retained this provision, but added the restriction that "the patent may be cancelled for reason of nonexploitation in a convention country only after a grace period of three years, commencing with the filing of the application in that country, and only in the event that the patentee fails to justify his inaction."[68] Compulsory licensing was adopted by the 1925 Convention,

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[65] *Id.*, p. 627, Sec. I.15 "(1) Weigert sich der Patentinhaber, die Benutzung der Erfindung einem anderen zu gestatten, der sich erbietet, eine angemessene Vergütung zu zahlen und Sicherheit dafür zu leisten, so ist diesem die Befugnis zur Benutzung zuzusprechen (Zwangslizenz), wenn die Erlaubnis im öffentlichen Interesse geboten is, und wenn mindestens drei Jahre vergangen sind, seit die Erteilung des Patents bekanntgemacht worden ist. Die Befugnis kann eingeschränkt erteilt und von Bedingungen abhängig gemacht werden. (2) Das Patent ist, soweit nicht Staatsverträge entgegenstehen, zurückzunehmen, wenn die Erfindung ausschliesslich oder hauptsächlich ausserhalb Deutschlands ausgeführt wird. Die Zurücknahme kann erst zwei Jahre nach rechtskräftiger Erteilung einer Zwangslizenz und nur dann verlangt werden, wenn dem öffentlichen Interesse durch Erteilung von Zwangslizenzen weiterhin nicht genügt werden kann . . ."

[66] Gesetzblatt 1950, p. 989.

[67] Convention d'Union de Paris du 20 Mars 1883 pour la Protection de la Propriété Industrielle. Art. 5: ". . . Toutefois le breveté restera soumis à l'obligation d'exploiter son brevet conformément aux lois du pays où il introduit les objets brevetés."

[68] *Id.*, as revised at Washington on June 2, 1911, by adding to above sentence: "mais avec la restriction que le brevet ne pourra être frappé de la déchéance pour cause de non-

which explicitly establishes the principle that nonuser is an abuse of the exclusive right granted to the patentee and that such abuse calls for restrictions of the exclusive right:

"Nevertheless, each contracting country shall be entitled to take the necessary legislative measures to prevent abuses, which might result from exercising the exclusive right granted by the patent, for example, failure of utilization. These measures shall provide for cancellation of the patent only in the event granting of compulsory licenses is not sufficient to prevent such abuses. In any event, the patent shall not be subject to such measures before the expiration of at least three years from the date on which it was granted, and if the patentee justifies his inaction by lawful excuses. . ."[69]

Compulsory licensing is unknown in certain Latin-American countries, although sanctions for nonuser in the form of revocation are applied with appropriate provisions to protect the inventor, waiving the sanctions in the event of justified delay or extending the deadlines. In Cuba, for instance, the owner of a patent must submit proof to show that the patent was exploited within three years after its date. If the patentee can show good reason for the delay in exploitation, three extensions of one year each may be obtained. The patent is revoked if not put to use during these time limits, but revocation may be postponed by public offering of licenses. If no licensee applies within a year after publication or if a license is granted but the licensee does not exploit the patent within a year, the patent will be revoked. Revocation will also take place if the patentee discontinues the exploitation for one year and one day, unless he can justify his inaction by showing circumstances beyond his control.[70]

In Peru, the patent lapses if the patentee does not commence exploitation within two years after the grant or within the time period specified in the grant, unless good cause be shown to justify the delay, in which case an extension of time may be obtained.[71]

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exploitation dans un pays de l'Union qu'après un délai de trois ans, compté à partir du dépôt de la demande dans ce pays, et seulement dans le cas où le breveté ne justifierait pas des causes de son inaction."

[69] *Id.*, as revised at The Hague on November 6, 1925, by substituting for the preceding text: "Toutefois chacun des pays contractants aura la faculté de prendre les mesures législatives nécessaires pour prévenir les abus qui pourraient résulter de l'exercice du droit exclusif conféré par le brevet, par exemple faute d'exploitation. Ces mesures ne pourront prévoir la déchéance du brevet que si la concession de licenses obligatoires ne suffisait pas pour prévenir ces abus. En tout cas, le brevet ne pourra pas faire l'objet de telles mesures avant l'expiration d'au moins trois années à compter de la date où il a été accordé et si le breveté justifie d'excuses légitimes . . ."

[70] Decree-Law No. 805 of April 4, 1936, La Jurisprudencia al Dia 1936, p. 777, Arts. 71-80, 91.

[71] Act of January 28, 1869 (Ley de Privilegios) as amended in 1903, Art. 15.

The patent law of Argentina provides that the patent be revoked if not exploited within two years after the grant or if exploitation is discontinued for any two-year period thereafter. This sanction is not invoked in case the patentee's delay is excused by the patent office on the ground of *force majeure* or other accidental cause.[72]

Compulsory licensing provisions exist in Brazil and may be invoked in the event of nonuser two years after the grant or if exploitation is discontinued for any consecutive two-year period thereafter, unless the patentee can justify his inactivity. The recipient of a compulsory license must start exploitation within six months after the license is granted, otherwise the patentee may request cancellation of the compulsory license.[73]

Under the patent law of Mexico[74] the original 15 year term for patents of invention is reduced to 12 years if the patent is not exploited during the first 12 years. Compulsory licensing may also be invoked if the patent is not utilized within the country to a reasonable extent during the first three years of its term or if utilization is discontinued for any consecutive six months period thereafter. The recipient of a compulsory license must begin utilization within six months and may not discontinue it for any three months period thereafter, otherwise the compulsory license is revoked.[75] It should be noted that the term of the patent begins not on the date of its issuance, but on the date on which the application is filed.[76] Thus, delay in issuing the patent does not result in an extended term of protection, as it is the case in the United States and in those countries where the term begins on the date of issuance.

In Venezuela the patent lapses if it remains unutilized for one or two years (depending on whether the patent was originally issued for a five or ten year term) after issuance.[77] This stiff sanction is significant especially in view of the fact that the law explicitly defines the inventor's right as an exclusive right.[78]

In Uruguay compulsory licenses may be granted if the patent is not put to use within the country within three years or if utilization is discontinued for any three year period thereafter. The law also contains provisions for

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[72] Act. No. 11 of 1864 (Ley de Patentes de Invención), Art. 47.

[73] Decree-Law No. 7903 of August 27, 1945 (Código da Propriedade Industrial) as amended by Decree-Law No. 8481 of December 27, 1945.

[74] Act of December 31, 1942 (Ley de la Propiedad Industrial).

[75] *Id.*, Arts. 53–71.

[76] *Id.*, Art. 38.

[77] Act. No. 16013 of July 9, 1927 (Ley de Patentes de Invención), Art. 5.

[78] *Id.*, Art. 2: "La patente concede al que la obtenga y a sus herederos o successores el derecho exclusivo de fabricar, usar y vender la invención o descubrimiento."

extending the original three year period, during which utilization must begin, by an additional period of two years.[79]

In Guatemala compulsory license may be granted if the patent is not put to use within the country within one year, or if utilization is discontinued for any consecutive three months period thereafter. The recipient of a compulsory license is under the obligation to begin utilization within six months and not to interrupt it for any consecutive two months period thereafter; otherwise the compulsory license is revoked.[80]

The patent statute of Chile[81] does not provide for any sanction in the event of nonuser. It offers, nevertheless, a powerful argument in favor of conditionally exclusive patent rights. The patent issues for a term of 5, 10 or 15 years, at the option of the applicant, and patents issued for a shorter term may be renewed at expiration for the balance of a longer term.[82] Application for renewal may be denied, however, if cancellation of the patent monopoly is necessary to protect the public interest or national industry.[83] Thus a sanction for not fulfilling a condition is applied in the form of refusal to renew a relatively short patent term, instead of revoking or restricting an existing patent. The result is the same in both cases: the exclusive patent right terminates upon non-fulfillment of a condition. But in the first case (refusal to renew) the principle of unconditionally exclusive patent rights limited in time only is not violated, in the second case (revocation or restriction) it is violated. By taking advantage of the first method, the controversial compulsory licensing procedure could be introduced in the United States without violating the constitutional argument as follows: The patent is granted for a term of three years, at the expiration of which it may be renewed for one or more additional terms whenever it was actually exploited during the preceding term, but not to exceed an aggregate term of seventeen years. Such a system may not be practical, but its theoretical possibility demonstrates the difficulty of maintaining the principle of unconditional patent rights not only from the functional, but also from the logical point of view.

III

In the preceding pages, the evolution of certain concepts concerning patents for invention has been traced. It has been shown that patents for

[79] Act No. 10089 of December 12, 1941 (Patentes de Invención), Arts. 9–11.

[80] Decree No. 2011 of August 18, 1937 (Ley de Patentes de Invención), Arts. 39–41.

[81] Act No. 958 of June 8, 1931 (Ley sobre la Propiedad Industrial).

[82] *Id.*, Arts. 7–8.

[83] *Id.*, Art. 8 ". . . No obstante lo dispuesto en el inciso anterior, en ciertos casos especiales podrá denegarse la renovación solicitada, si el interés publico o un manifiesto perjuicio para la industria nacional aconsejan hacer cesar el monopolio."

invention trace their origin generally to the Middle Ages, to the trade monopolies or privileges granted in Europe in the form of letters patent as a prerogative of the sovereign. Their purpose was the establishment and protection of trade, and in accord with this constructive aim the grants were customarily subject to the requirement that they be actually utilized, or else be revoked.

The evolution from these early beginnings to the present time has affected many aspects of the underlying concepts. The grants were extended to cover inventions, at first incidentally because mechanical inventions were important concomitants of trade, and later for the explicit purpose of encouraging inventions as such. The terminology also has changed; such grants became known as patents for invention. The source of these grants has been transferred from the prerogative of the sovereign to statutory patent systems, in which the inventor is entitled to protection as a matter of law. The requirement that the grant be utilized was retained throughout this evolution, but the sanction attached to nonuser has developed from the original unqualified revocation to qualified revocation after a stated period of grace and, ultimately, to compulsory licensing with various safeguards for the protection of the patentee.

Two features have been consistently present during this evolution: First, the inventor's right is always considered as an exclusive right, either explicitly labeled as such or implied in the definitions used. Second, this exclusive right is always subject to some sanction for nonuser; it is a conditionally exclusive right.

At the end of the eighteenth century, when the Constitution was drafted, the state of this evolution could be summarized as follows: Statutory patent law was in its mere infancy. Revocation of patents was employed chiefly as a sanction for nonutilization; the statutory provisions for compulsory licensing as sanctions for nonuser did not appear for about another century. The inventor's right was considered at this time—as throughout the evolution—a conditionally exclusive right.

In interpreting the patent clause of the Constitution in the light of the foregoing, it is quite clear that in the context of exclusive rights as generally applied to the right of inventors at the end of the eighteenth century, *exclusive* means *conditionally exclusive*. What the actual intention of the authors of the Constitution was, we do not profess to know. Speculation offers three possible conclusions. First, the authors of the Constitution were aware of the meaning of the adjective *exclusive* as generally applied at that time to inventors' rights, and they used it in that sense. Second, the authors of the Constitution had no specific intention to qualify the

meaning of *exclusive*. In both of these conclusions, the interpretation of the patent clause as authorizing grants of *conditionally exclusive* rights is permissible. Third, the authors of the Constitution intended to abolish conditionally exclusive patent rights, to the extent that such rights were known at that time, and they anticipated the future evolution of compulsory licensing and intended to keep that evolution out of the American patent system. This would be a rather improbable conclusion, if only because of the difficulty of believing that the authors of the Constitution could have had such strong feelings about an issue which was hardly formulated and developed at that time. It would also seem that, if such had been intended, they would not have hesitated to provide explicitly for *unconditionally* exclusive rights and have avoided the use of a word of opposed or at least ambiguous meaning, just as they avoided the use of the then ambiguous terms of *patent* or *copyright*.

HELEN SILVING

Nationality in Comparative Law

NATIONALITY LAW IS CLOSELY CONNECTED with the political structure of a country, more so than most branches of law. It determines who shall be a "citizen," and thus what shall be the composition of the "nation." The concept of "nationality" prevailing in a country importantly reflects its political philosophy, which is also expressed in a country's attitude towards "foreign nationality." But in the determination of foreign nationality, realism requires that proof of foreign nationality be related to the rules of the foreign municipal law which govern such nationality.

The present paper deals with the idea of nationality, as expressed in certain rules prevailing in various legal systems, and with proof of foreign nationality. The topics discussed have been selected from the comprehensive field of jurisprudence which is often referred to in countries of the European continent as the "General Theory of Nationality."

THE MEANING OF "NATIONALITY"

Like other legal terms used to describe phenomena appearing in different legal systems, the term "nationality" has no uniform meaning applicable in all countries, other than perhaps the very general meaning of being a tie which connects an individual with a state. The term "nationality" or "citizenship" is a generalization inferred in any given legal system from the connection of certain hypothetical facts (e.g., birth within a certain territory or descent from a certain parent) as legal conditions, with certain legal consequences (e.g., suffrage, military duty) attaching rights or duties to such conditions. The sum total of all such conditions and consequences constitutes the nationality law of a country and thereby defines its concept of "nationality" or "citizenship" in a broad sense; the term "nationality law" is traditionally used as referring merely to the conditions of acquisition and loss of nationality. Thus, the concept of nationality is never the same in any two legal systems, as such legal conditions and consequences vary in each system. Nor does the concept of nationality remain static within a given legal system; as Makarov has correctly stated,[1] each new law may change the character of nationality.

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[1] Makarov, Allgemeine Lehren des Staatsangehörigkeitsrechts (1947) 32.

In recent decades, the "nationality" concept has become more complex and the vagueness of the term has consequently increased. In countries that have adopted the *jus sanguinis*, there is a marked tendency to introduce also elements of the *jus soli*, while in those that traditionally adhere to the *jus soli*, elements of the *jus saguinis* are gaining in importance. The combinations in which these principles occur in the several countries differ widely. The laws concerning the nationality of married women and children of nationally mixed marriages are being revised to a varying extent.[2] In the field of consequences, Soviet Russia for some time—the provision is no longer in force—granted political rights to aliens,[3] whereas Germany under the National Socialist regime deprived entire groups of nationals of all political rights.[4] Thus, it may be said that, in our times more than ever before, there are no typical conditions or typical consequences defining "nationality." There are, however, certain conditions and consequences from which the various nationality laws select the elements which are to enter into the particular nationality concept of their choice. The following should be noted among such conditions of nationality: birth within a certain territory, descent from certain parents, a combination of both, birth and domicile within a territory, marriage, recognition of an illegitimate child (or establishment of parentage with regard to an illegitimate child by judgment), legitimation, adoption, military service, appointment to certain public offices, naturalization, transfer of territory, option. The consequences which flow from such conditions may be: military duty, duty of loyalty (treason legislation), political rights, right to hold public office or to exercise certain professions, right to own land, determination of the civil status of the person concerned by the law of the country of which he is a national, access to courts, right not to be extradited, protection abroad, etc. To the extent that each "nationality" concept is composed of conditions and consequences selected from these categories, it may be said that there is a general "nationality" concept of comparative law.

To be distinguished from this comparative concept of nationality is the nationality concept applied in cases in which authorities in one

[2] See Nationality of Married Women, Report submitted by the Secretary-General, United Nations Commission on the Status of Women, New York, 1954.

[3] Article 20 of the Constitution of the Russian Federated Soviet Republic of July 10, 1918 (RSFSR Laws 1918, text 562); this provision was adopted by all subsequent laws of the Union of Socialist Soviet Republics, Art. 2, Nationality Act of October 29, 1924, USSR Laws 1924, text 202; Art. 6, Nationality Act of June 13, 1930, USSR Laws 1930, text 367; Art. 6, Nationality Act of April 22, 1931, USSR Laws 1931, text 196) until the Nationality Act of August 19, 1938 (Vedomosti 1938, No. 11), which abandoned it.

[4] Reich Citizenship Law (*Reichsbürgergesetz*) of September 15, 1935 [1935] Reichsgesetzblatt pt. I at 1146, and regulations issued thereunder.

country are called upon to determine a nationality status under the law of another country. Subject to certain exceptions, another country's designation of a person as a "national" is generally accepted, regardless of the meaning of that concept within the municipal law of such country.[5] Because of this rather formal approach to "foreign nationality," it is maintained in theory[6] that there are in fact two types of nationality, "citizenship" proper or citizenship of municipal law, which is variable and differs widely in the various countries of the world, and "nationality" in a broader sense, which is constant and which is applied in situations involving more than one legal system. However, so far as the consequences attaching to nationality are concerned, even this broad concept of nationality has no uniform meaning. The effects accorded to foreign nationality in the different municipal legal systems vary widely.

Nor is there uniformity as regards the consequences attaching to nationality in the field of international relations proper. Thus, governments adopt divergent policies regarding protection of their citizens abroad. The United States has a very substantial conception of a country's duty to protect its citizens; by federal statute the President is bound to use means not amounting to acts of war to protect United States citizens.[7] On the other hand, the idea which the National Socialists had concerning protection of German nationals deemed to be "Jews" is evidenced by the laws which expatriated such nationals as soon as they left Germany.[8] However, there are said to be typical consequences of nationality in international law, viz.,[9] (1) that a state has a right to protect its nationals abroad; (2) that it has the right to legislate with respect to their conduct abroad; and (3) that it has the duty to receive them back in its territory if a foreign state desires to deport them.

In addition to the divergence in the meaning of "nationality," depending on its use on a purely municipal, on an intermunicipal, or on an international level, there are varieties of status within the municipal nationality

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[5] As stated by Judge Harlan (now Mr. Justice Harlan) in Murarka v. Bachrack Bros., 215 F 2d 547 (C. C. A. 2d, 1954) at 553: "It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, Signed at the Hague, April 12, 1930, Arts. 1 and 2; Briggs, The Law of Nations (2d ed. 1952) 458–60; Dept. of State Bull. XXII, No. 559, pp. 433–441 (March 20, 1950); Stoeck v. Public Trustee, 2 Ch. 67 (1921)."

[6] See Hyde, 2 International Law Chiefly as Interpreted and Applied by the United States (2nd ed., 1947) Section 342, at 1064–67.

[7] 15 Stat. 224, R. S. 2001, 22 U. S. C. §1732 (1952 ed.).

[8] Eleventh Regulation under the Reich Citizenship Law, November 25, 1941, [1941] Reichsgesetzblatt pt. I at 722.

[9] Compare J. Mervyn Jones, British Nationality Law and Practice (1947) 2.

concept, on the one hand, and types of status which border on nationality, on the other. The municipal nationality concept may include various classes of nationals, members of one class having lesser rights than those of another. Thus, e.g., in United States and French law, a natural-born citizen has certain rights not accorded to a naturalized citizen.[10] An extreme example of divergence of nationality status may be found in the Reich Citizenship Law (*Reichsbürgergesetz*),[11] enacted by the National Socialist regime and since repealed, which distinguished the "*Staatsangehöriger*" (national, member of the state) and the "*Reichsbürger*" (Reich citizen). Only the latter status carried political rights. Examples of types of status bordering on nationality may be best found in French law. French nationality, "*qualité de français*," or nationality within the meaning of the French Nationality Code,[12] represents the closest parallel to United States citizenship within the meaning of the Immigration and Nationality Act of June 27, 1952.[13] In the former French colonies,[14] there is a distinctive status called "French citizenship": the "French citizen" (*citoyen Français*), while not a French national, enjoys greater rights than the "French subject" (*sujet*).[15] The most indefinite status is that of the "*ressortissants*,"[16] but these are persons who have no other tie

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[10] Section 1484 of the Immigration and Nationality Act, Act June 27, 1952, c. 477, 66 Stat. 163, 8 U. S. C. Sections 1101–1503, providing for loss of United States citizenship by residence abroad for a certain number of years, applies only to naturalized citizens. Article 81 of the Code of French Nationality (Ordinance No. 45–2441 of October 19, 1945, containing the Code of Nationality, [1945] Journal Officiel 6760, as variously amended) subjects the naturalized national to a series of limitations not imposed upon the natural-born national.

[11] Cited *supra*, note 4.

[12] Cited *supra*, note 10.

[13] Cited *supra*, note 10.

[14] The French Constitution of October 27, 1946 replaced the term "colonies" by the term "overseas territories."

[15] "French citizens" enjoy certain civil rights not shared by "French subjects," who are governed by special penal laws and have fewer civil and political rights. There is, in addition, the concept of "status at civil law" (*statut personnel*), consisting in each individual being subject to the law of his particular religious, racial or national group.

[16] Even prior to the Constitution of 1946, various special decrees, different for each territory and colony, provided for procedures whereby French citizenship could be granted to the *ressortissants* either by decree or by judgment. For citations see Dalloz, Nouveau Répertoire de Droit (1950), title "Union Française," 665, at 669. Acquisition of citizenship implied renunciation of personal status at civil law. In French India, a native could become a French citizen by renouncing his personal status before a notary, an officer of civil status, or a justice of the peace. French citizenship and personal status were generally conferred upon the inhabitants of Pomare in Oceania, and later upon all the *ressortissants* of the French Establishments of Oceania and all the native Jews descending from parents settled in Algeria before 1830. In more recent years, French citizenship was conferred by various general decrees upon all the *ressortissants* of the French Republic (which is composed of metropolitan France, the overseas districts and territories), even upon those who preserved their personal status. Finally, the

with any state (except the indirect tie of being citizens of the French Union) than that of being "*ressortissants*."[17] Finally, the French Constitution of 1946 introduced a new type of national status, "citizenship in the French Union," that union being a composite structure, combining "nations and peoples."[18] In Germany, article 116(1) of the Constitution of the Federal Republic created a novel inchoate type of nationality status, that of "a German within the meaning of this Basic Law." This status is conferred upon the "refugees and expellees of German stock"; it "places them on the same footing with German nationals," without making them such nationals.[19]

It is also important to note that the concept of foreign nationality is not necessarily unitary. A person may be recognized as a national of a given foreign country within one context but not within another. Thus, the International Court of Justice, in the *Nottebohm Case*,[20] specifically confined the issue of Nottebohm's status as a Liechtenstein national to the question whether or not he was such national for purposes of international protection vis à vis Guatemala. In the case of *Laurine v. Laurine*,[21] the Supreme Court of Sweden held that Soviet nationality in form only will be given no effect for purposes of the Swedish law of conflicts.[22]

so-called "loi Lamine-Gueye" (Law No. 46–940 of May 7, 1946 [1946] Journal Officiel 3888) recognized as French citizens all *ressortissants* of overseas territories. By contrast, *ressortissants* of associated territories and states are neither French nationals nor French citizens.

[17] Thus, the people of Cameroun (associated territory) are merely French *ressortissants*. They have no other nationality status with regard to any state. However, although not French citizens, they enjoy the same status at public and private law as the *ressortissants* of overseas territories. See Dalloz, *supra*, note 16, title "Territoires sous tutelle, territoires associés," 488, at 491.

[18] See Preamble of the French Constitution, 1946.

[19] See Grabendorff, "Die Einflussnahme des Art. 116 Bonner Grundgesetz auf das Staatsangehörigkeitsrecht," Die Öffentliche Verwaltung 1951, 268.

[20] Nottebohm Case (Second phase), Judgment of April 6, 1955: I. C. J. Reports 1955, p. 4.

[21] Decided February 25, 1949, reported in 16 Zeitschrift für ausländisches und internationales Privatrecht, founded by Rabel (hereinafter cited as Rabels Z) (1950) 145–7.

[22] The spouses Laurine, Estonians of origin, fled Estonia in September, 1944, and thereafter resided in Sweden. They petitioned the city court of Stockholm for separation from bed and board, which is unknown in Soviet law. The courts below rejected the petition on the ground that the petitioners were Soviet nationals, the Ministry of the Interior of Sweden having so found on the ground that the Supreme Council of the Soviet Union declared on September 7, 1940, that nationals of the Estonian Soviet Republic have become Soviet nationals as of the date of the admission of Estonia into the Soviet Union, i.e., August 4, 1940. In reversing the judgment denying the petition, the Supreme Court stated:

"Under the Law concerning certain Legal Relations with respect to Marriage, Guardianship and Adoption, Third Chapter, Section 2, 'hemskillnad' (separation) may be granted only if under the law of the country of which the spouses are nationals such separation is available and only if a separation ground exists both under that law and under Swedish law. . . . The facts herein do not justify the assumption that the two spouses who now reside in Sweden are stateless persons. However, it has been shown that the spouses came to Sweden in September,

Such decisions do not foreclose the issue of the nationality status of the individuals concerned within contexts other then those involved in the case at bar.

Relation of Nationality Law to Other Fields of Law and to Foreign Nationality Laws

The nationality of an individual may be relevant in varying legal contexts within diverse legal systems. For example, in one legal system the status of being a national may be politically meaningless but extremely significant for purposes of the law of conflicts,[23] while in another, the converse rules may prevail.[24] Or, in some systems of law, it may be significant in the field of political rights as well as in that of conflicts law. Moreover, political ideas which shape nationality provisions may indirectly affect the role of nationality within the area of the law of conflicts. Thus, the political principle of the equality of men and women made it possible for the wife to have a nationality different from that of the husband[25] and thus gave rise to numerous marriages of mixed nationality. Divergence of nationality within the family, in turn, called for reconsideration of the role of nationality in matters such as divorce of spouses of different nationality. In France, for instance, such divorces are now governed apparently by the law of the country of the matrimonial domicile rather than by that of nationality. [26, 27]

1944, as political refugees, that they do not enjoy Soviet protection, and that they do not intend to return to Soviet Russia. The Soviet nationality which the spouses acquired by virtue of the incorporation of Estonia into the Soviet Union is a merely formal matter."

After discussing the policy underlying the Swedish law cited, the Court found that persons such as petitioners "who have no real connection with their home country" ought to be treated for purposes of that law as stateless persons.

[23] Undoubtedly, the nationality of persons deemed to be "Jews" under the National Socialist regime was politically meaningless. But such persons were treated as Germans for purposes of the German law of conflicts, in which the principle of *lex patriae* prevails, as well as for purposes of the conflicts law of other countries which adhere to the same principle.

[24] In the United States, "The individual citizen is the smallest individual unit of government . . ." Petition of Kutay, 121 F. Supp. 537 (D. C., S. D. Calif., Central Div., 1954) at 538. But in the law of conflicts, the prevailing principle is that of domicile rather than that of nationality.

[25] See *supra*, note 2.

[26] See Batiffol, "Recognition in France of Foreign Decrees Divorcing Spouses of Different Nationality," 4 Am. Journ. of Comp. L. (1955) 574; Lewandowski c. Lewandowski, Cour de Cassation (Ch. Civ. 1re Sect. civ.), March 15, 1955, Recueils Dalloz et Sirey 1955, Jurisprudence 540, with Note by Chavrier.

[27] While opinions on the question whether present German rules of conflicts, which favor the *lex patriae* of the husband, violate the equality principle are divided (for citation of authorities on the subject see Palandt, Bürgerliches Gesetzbuch, (15th ed., 1956), note 18 preceding art. 7 of the Introductory Act to the German Civil Code, at 1645, 1646), efforts are being made to amend the present conflicts rules.

Nationality provisions and rules of conflicts of laws also are interrelated as a result of the fact that in many legal systems the law of nationality, the *lex patriae*, determines the civil status of a person and at the same time it may frequently depend on the civil status, e.g., the status of being a legitimate child or the marriage status.[28]

In the field of nationality law itself, there is a special branch which may be described as "the law of conflicts in nationality matters," namely, the law determining whether certain rules of foreign law, on which the existence, acquisition, or loss of nationality may depend, will be given effect. For instance, the acquisition or loss of the nationality of a particular country may be dependent on the absence or presence, the loss or acquisition, of a foreign nationality. The question whether the foreign nationality exists may or may not be referred to the law of the country whose nationality is in issue. For instance, should an act of naturalization by a foreign country be characterized as "naturalization" when it was performed in violation of a national law? Thus, under the law preceding the present Swiss Nationality Act, Switzerland might naturalize a German married woman on her own application, although under German law she was under disability.[29] Germany, in turn, would refuse to recognize this as a

[28] On this see Savatier, Cours de Droit International Privé (1947) item 265 at 176.

A case decided by the Supreme Court of Bavaria on October 2, 1953, (Bay Ob LG. Beschl. v. 2.10.1953—BReg. 1 Z 162/52, in Neue Juristische Wochenschrift—hereinafter cited NJW—(1954) 350) may serve as an illustration of the difficulties involved in such cases. An illegitimate child, born and raised in Germany, was recognized in that country by the German father, and a guardian appointed for the child by a German court. The mother being a Swiss citizen, a guardian was also appointed for the child in Switzerland. The Swiss guardian sought to have the German guardianship revoked. The court decided in his favor over the objection of the German guardian. It held that the relationship of an illegitimate child to the mother is governed by the latter's *lex patriae*; that that law also governs the father's duty of support; but that, in all other respects, the illegitimate father-child relationship is governed by the national law of the father, so that the significance of recognition must be determined in this instance by German law; that, under that law, recognition does not affect the child's status; and that, in any event, under Swiss law, an alien cannot recognize a child "with status consequences." The court concluded consequently that the child was a Swiss national, his illegitimate mother being Swiss. It held that the *lex patriae* of the child governs guardianship; consequently that, in this instance, Swiss law determines the applicable rules of guardianship and jurisdiction to appoint a guardian.

[29] The Swiss Federal Law of June 22, 1881, concerning Personal Capacity (art. 10, subdiv. 2) provided: "The personal capacity of aliens is determined by the law of the country of which they are nationals." This provision has been also applied to the determination of the personal capacity of a married woman, although art. 7, subdiv. 1, of the Swiss Federal Law of June 25, 1891, concerning the Civil Status of Settlers and Sojourners (2 Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848–1947 [1949] at 737) provides that the personal capacity of a married woman is determined by the law of the (matrimonial) domicile. See Stauffer, Das Internationale Privatrecht der Schweiz auf Grund des BG. betr. die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter vom 25. Juni 1891/10. December 1907 (1925) annotation 1 to art. 7; 1 Schnitzer, Handbuch des Internationalen Privatrechts (3d rev. ed.

"naturalization" resulting in loss of German nationality within the German law of voluntary expatriation.[30]

The principles prevailing in the law of the conflict in nationality matters are *sui generis*. They differ from general rules of conflicts law. For instance, in a situation such as that described above, Switzerland would defer to a foreign provision placing a married woman under disability for certain purposes of the civil law, but not for purposes of nationality law.[31] While unable to engage in certain civil law transactions in Switzerland,[32] she could apply for Swiss naturalization. Under French law, which provides that, in the case of an illegitimate child, the parent-child relationship may be established upon recognition by the parent, the act of recognition, performed in a foreign country, is governed by the legal standards of that country so far as private rights arising therefrom are concerned. With reference to French nationality, however, French standards of recognition must be satisfied in order to create a legally relevant parent-

1950) 261, 262, 269. In accordance with this interpretation, Switzerland would not, until about 1913, naturalize on her own petition a married woman who, by virtue of her personal law, was under disability. This position was abandoned by federal practice on the ground that the personal capacity of married women in nationality matters is a question of Swiss public policy.

However, under art. 32 of the new Nationality Act (Federal Law of September 29, 1952, concerning Acquisition and Loss of Swiss Citizenship, Sammlung der eidgenössischen Gesetze, No. 53, p. 1087; Recueil des Lois Fédérales, No. 53, p. 1115), a married woman may be naturalized only together with her husband.

[30] See Section 25, subdiv. (1), Reich and State Nationality Law of 1913 (Act of July 22, 1913 [1913] Reichsgesetzblatt 583). This provision concerning disability of married women seems to be no longer in force. Arts. 3(2) and 117(1), Constitution of the Federal Republic of Germany, render the equality of men and women automatically applicable as of April 1, 1953.

An issue such as that described in the text also arose between the United States and England in consequence of the Naturalization Convention of May 13, 1870. It was agreed that Britain would recognize naturalizations of British subjects in the United States and that, *vice versa*, the United States would recognize naturalizations of United States citizens in Britain. But when the question arose of what constitutes a "naturalization," Britain was not satisfied with a United States designation of certain acts as "naturalizations." A British woman who after 1922 (Cable Act) married a United States citizen and retained British nationality because she did not by reason of her marriage acquire United States citizenship, could not, until the British Nationality Act of 1948, be "naturalized" in the United States, within the meaning of English law, for as a married woman she was under disability. When naturalized in the United States, she was a United States citizen under United States law, but not under English law. See Jones, *op. cit., supra*, note 9, at 91.

[31] For the general rule governing the personal capacity of married women in Switzerland, see *supra*, note 29.

[32] In the interest of facilitating commerce, the Swiss Law of 1891 (*supra*, note 29, art. 7(b)) provides that an alien who has concluded a transaction in Switzerland may not claim that he possessed no personal capacity under his *lex patriae*, if at the time of the transaction he possessed such capacity under Swiss law. But this rule does not apply to certain classes of transactions which are not of the everyday type.

child relationship.[33] Thus, a situation may arise where a person *is* a "father" for purposes of, e.g., the law of support, but *is not* a "father" for purposes of conferring upon the child nationality by descent.[34]

In general, the principle prevails that while a nationality status of one state may be predicated upon operation of the nationality rules of another, each state ultimately determines all matters pertaining to its own nationality in accordance with its own laws. This principle is sometimes expressed in the misleading statement that in this area no conflict of laws is possible.[35] However, a conflict may undoubtedly arise so far as recognition of another state's determination of its own nationality is concerned. As a general rule, a court will not look behind a foreign country's formal declaration that an individual is or is not such country's national. It will reject such declaration as not binding upon itself only on grounds of the "public policy" of the forum. Thus, the Swiss Federal Tribunal refused to give effect to a National Socialist law expatriating German Jews, as violative of Swiss public policy of the equality of all citizens before the law. Under Swiss law, expatriated German Jews remained German nationals even though they were not German nationals under German law.[36] British courts refused to recognize the same foreign legislation

[33] Art. 27, French Nationality Code, cited *supra*, note 10.

[34] See Raape, Die Staatsangehörigkeit kraft Eheschliessung und kraft Abstammung (1948) 87 *et seq.* A statement that in such instances the person concerned *is* the father but that his parenthood does not affect the nationality status of the child would not correctly convey the meaning of the provisions of the Nationality Code. For these provisions contain no independent definition of recognition but use the phrase "an illegitimate child . . . with regard to whom parenthood has been established . . . " (Arts. 17(2), 18(2), 19(2), 23(2), 24(2), Code of French Nationality), and Art. 27 expressly provides that filiation, for purposes of attribution of French nationality, must be established in accordance with the requirements of French "civil law."

[35] 1 Arminjon, Précis de Droit International Privé (3d ed. 1947) 207, and authorities cited in note (1).

[36] Dame Levita-Muehlstein c. Department fédéral de justice et police, Schweizerisches Bundesgericht, June 14, 1946, 72 Entscheidungen des Schweizerischen Bundesgerichts, Part I, at 407 (cited in the following thus: BGE 72 I 407 (1946)). A Swiss woman married a German Jew, who was expatriated by virtue of the Eleventh Regulation under the Reich Citizenship Law of November 25, 1941 (cited *supra*, note 8), providing for the loss of German nationality by Jews residing abroad. Under the Swiss law in force at the time of the marriage (July 31, 1945), a Swiss woman marrying an alien retained her Swiss citizenship if, unless she retained it, she would inevitably become stateless. Art. 5 of the Resolution of the Federal Council of November 11, 1941 (1 Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848–1947 (1949) at 106). The petitioner claimed that this provision was applicable in her case, her husband having become stateless by operation of the German law, so that, unless she preserved Swiss citizenship, she would share his fate. The court rejected this contention asserting that the husband did not, in the light of Swiss law, forfeit German nationality. It said (*supra*, at 413):

" . . . it appears that to the extent that the German legislation makes a distinction between 'Jews' and 'Aryans' on the ground of race, it is contrary to Swiss public policy and con-

on the ground that it effected a loss of enemy nationality during wartime.[37]

The law of conflicts in nationality matters further determines the important question whether the existence of dual nationality will be at all recognized. The Polish Nationality Act of 1951 contains an express provision excluding dual nationality.[38] Most laws, however, recognize that a person may possess two or more nationalities; many include provisions for the resolution of some of the conflicts which may result therefrom. Thus, a country may deny protection to its own citizen who is also a national of another country in the country of his second allegiance.[39] Nationality laws also at times provide for the ultimate resolution of conflicts of nationalities by expatriation or release of dual nationals under defined circumstances.[40]

On the other hand, the law of conflicts in nationality matters may give rise to the rare phenomenon of "relative nationality," i.e., a nationality which under the law of the country conferring it, is effective in some countries but not in others. Thus, under a French rule of conflicts law, the child of a French mother and a Moroccan father is a French national but may not rely on its French nationality in Morocco except with express consent of the Sultan.[41] Such a child is not a dual national. It is, even

sequently cannot be applied in Switzerland because its application would violate in an intolerable manner the sense of justice as generally prevailing in this country (citation). The distinctions drawn by the German law which are based on racial arguments are repugnant to the sense of justice, because they are contrary to the principle of equality of men and violate in an intolerable manner the idea of equality of citizens before the law, as accepted in Switzerland. Provisions which draw such distinctions are hence inapplicable in Switzerland and, as a matter of principle, cannot be sanctioned by Swiss authorities. Therefore, according to the law in force in Switzerland, the husband has not lost German nationality."

In a later case, the Federal Tribunal did not invoke public policy on the ground that its application would cause injury to the petitioner. Rosenthal g. Eidg. Justiz- und Polizeidepartement, BGE 74 1 346 (1948).

[37] Lowenthal and others v. Attorney General [1946] 1 All E. R. 295.

In the Levita-Muehlstein case, *supra*, the ultimate issue was determination of the Swiss nationality status of Mrs. Levita-Muehlstein. The case may, therefore, be rationalized on the basis of the general principle that all questions pertaining to Swiss nationality are ultimately determined by Swiss law. In the Lowenthal case, *per contra*, British nationality was not in issue.

[38] Article 1 of the Law of January 8, 1951, concerning Polish Nationality, [1951] Dziennik Ustaw, Nr. 4, Poz. 25 (Official Journal of Laws, No. 4, Item 25), provides: "A Polish citizen cannot simultaneously be a citizen of another country."

[39] See article 46, Swiss Consular Regulation of October 26, 1923 (1 Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848–1947 (1949) at 346).

[40] Art. 91, French Nationality Code, cited *supra*, note 10; Art. 48, Swiss Nationality Act, 1952, cited *supra*, note 29.

[41] Decree No. 48–1550 of October 2, 1948, concerning Application in the French Zone of the Cherifian Empire of Article 19 of the Code of French Nationality, [1948] Journal Officiel 9651. For discussion of this decree see Boulbès, "Le problème de l'application au Maroc du Code de la Nationalité Française," 15 Nouv. Rev. de dr. intern. privé, (1948) 5.

under French law, a Moroccan national in Morocco. Everywhere else it is a French national, within the meaning of French law.

The postwar division of Germany into a Western and an Eastern part brought about a peculiar phenomenon in nationality law, which might be best described as "quasi conflict in nationality matters." The Bundesgerichtshof of the Federal Republic of Germany,[42] in a decision rendered on February 23, 1954,[43] refused to recognize a grant of German nationality by a Soviet Zone authority, effected without compliance with certain basic provisions of the Reich and State Nationality Law of 1913.[44] The court held that, while there are two legal systems in Germany, there is only one German state and accordingly only one German nationality. Therefore, acquisition of German nationality in the Soviet Zone, for instance, by birth from a German father, will be recognized in the Western Zone. The case at bar, in the court's view, did not require it to deal with the broad question whether nationality provisions of the Soviet Zone authorities will be judged by standards of Soviet Zone law or rather by those of the West German law. In any event, such provisions will not be recognized where—as in the case at bar—they are contrary to "important ends of the legal system of the Federal Republic or to its public policy."

Individual and Public Interests As Reflected in Nationality Legislation

In continental European law, influenced by Roman jurisprudence, fine conceptual distinctions and theoretical classifications play an important role. Far from being merely jurisprudential niceties, they frequently—at least apparently—determine the course of judicial and administrative decisions on practical issues. For that reason they deserve notice.

The foremost problem of classification in the field of nationality law has been the question whether such law pertains to the sphere of private or to that of public law.[45] On the answer to this question allegedly may de-

[42] Highest court of the Federal Republic of Germany in civil and criminal matters.

[43] Matter of Lachinger, Bundesgerichtshof (3. Strafsenat), Feb. 23, 1954, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen (1954) 318. The case involved an Austrian request for extradition. Germany does not extradite her own citizens. Art. 16, subdiv. 2, 1st sentence, Constitution of the Federal Republic.

[44] Such fundamental requirements of naturalization under the Reich and State Nationality Law 1913 are, as stated by the court (*supra*, at 322–323), those contained in Section 8, numbers 2 to 4 (excluding the naturalization of criminals and persons likely to become public charges) and in Section 16, subdiv. 1 (whereby acquisition of nationality is effected by a formal delivery of the certificate of naturalization).

[45] Occasional references to this problem may be found in the law of this country. Thus, Chief Justice Fuller, dissenting in United States v. Wong Kim Ark, 169 U. S. 649, 705, at 707 (1897), stated: "Nationality is essentially a political idea, and belongs to the sphere of public law."

pend the decisions whether, in case of doubt, nationality laws have retroactive effect; whether, absent a specific provision, legitimation confers nationality; whether a law tolling statutes of limitation barring private actions applies to declarations affecting nationality; in short, whether nationality is governed by the established rules of private law or is an independent institution with its own distinctive rules.[46]

Actually, the classification of nationality matters as belonging either to the province of private law or to that of public law does not flow from any quality inherent in nationality generally. It merely reflects the nationality rules prevailing in a given legal system at a particular period. It is the result rather than the cause of the policy adopted with regard to certain questions pertaining to nationality. The frequent statements that certain rules necessarily follow from the nature of nationality, as a matter of public or of private law, are misleading. The true grounds underlying such statements are that it has been found desirable to protect certain public or individual interests, as the case may be, even though the determination may be reached by analogy to a previous decision involving nationality. Nor is it true that, in the area of so-called "public law," public interest is always necessarily paramount to individual interest.[47] However, in the history of nationality law in the various periods in various countries, there may be observed prevailing trends stressing individual rights or public interest; these have found expression in the classifications of nationality as of private or public law. This distinction is adopted in the following presentation as reflecting the arguments customarily used by courts and writers in considering nationality issues.[48]

Certain features of the modern nationality concept have their origin in the feudal conception of nationality as a relationship between a vassal and his lord.[49] That relationship was in the nature of a personal tie based on contract and importing mutual obligations. One of its characteristics was the exemption of the subject from the sovereign's *droit d'aubaine*, his

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[46] Boulbès, Commentaire du Code de la Nationalité Française (Ordonnance du 19 Octobre 1945) (1946) 7.

[47] Of course, the Roman classical jurists defined "*jus publicum*" as that law which "*ad statum rei Romanae, ad publice utilia spectat*," and "*jus privatum*" as that law which "*ad singulorum utilitatem, ad privatum utilia spectat*." On this see 2 Austin's Lectures on Jurisprudence (5th ed. Campbell, 1885) 752. But within the broad field of law conventionally accepted to be "public" in terms of the above definition, specific issues have been often resolved in favor of the individuals concerned, despite conflicting state interest.

[48] Typical of such arguments is that of the French Cour de Cassation in the Affaires Colom and Kroll. Cour de Cassation (Ch. réun.), Feb. 2, 1921, [1921] Dalloz Jurisprudence I, 5. The court rejected the contention that the tolling of statutes of limitation in civil, commercial, and administrative matters, for the duration of the war (Decree of August 10, 1914), was also applicable to nationality matters, on the ground that "nationality belongs to public law."

[49] The modern concept of "allegiance," for instance, is traceable to that feudal relationship.

right of escheat in the estate of an alien decedent.[50] As pertaining to the field of property law, nationality was deemed a concept of private law. Rousseau stressed a political concept of nationality in distinguishing between the "*citoyen*" (citizen), as "participant in the sovereign authority," and the "*sujet*" (subject), as "subject to the laws of the state."[51] This distinction was followed by the framers of the French Revolution. It was felt that, since the "citizen" shapes the government of the state, the selection of citizens is a matter of primary political importance, significantly affecting the interests of the country. Nevertheless, nationality continued to be treated primarily as a civil status within the context of the law of conflicts. The rules governing nationality were thus included in the French Civil Code, enacted after the Revolution. Other codes followed suit.[52] Not until 1927 did the movement toward emancipation of nationality law from the sphere of "private law" find legislative expression in France. In that year, the articles of the Civil Code dealing with nationality were replaced by a separate law,[53] which was deemed to be part of public law. The foremost principle of the present Code of French Nationality[54] is said to be: "Nationality is an institution of public law."[55] Other countries are moving in the same direction. It is thus said that, in the new Italian Civil Code of 1940, the concept of nationality, being of public law, is incorporated rather than created.[56] In Germany, the prevailing opinion has long been that nationality is a "relationship of public law."[57] While the new Swiss Nationality Act of 1952[58] in significant respects enlarges the area of protection of individual interests as opposed to those of the state, this is not accompanied by doctrinal adherence to the "private law" conception of nationality.

Originating in the democratic ideology of the individual's right to participation in government, the political concept of citizenship raises

[50] Boulbès, *op. cit., supra*, note 46, at 3.

[51] Rousseau, Contrat Social, i. I, c. VI.

[52] The fact that rules on "nationality" are included in civil codes is considered an indication of a "private law" conception of nationality. The transfer of nationality law from such codes to special statutes, as in Italy, Belgium, France, and Luxemburg, is said to indicate recognition of its "public law" character. See Makarov, *op. cit., supra*, note 1, at 159. However, even where such transfer has occurred, "nationality" continues to be listed as a topic under the general title "international private law." In Niboyet's classic treatise, Traité de Droit International Privé Français, volume I (2nd ed. 1947) is devoted to discussion of French nationality law, volume II to the treatment of aliens. A substantial part of Lerebours-Pigeonnière, Précis de Droit International Privé (6th ed. 1954) deals with these problems.

[53] Law of August 10, 1927, [1927] Journal Officiel 8697.

[54] Cited *supra*, note 10.

[55] Aymond, La Nationalité Française (1947) 11.

[56] Monaco, Manuale di Diritto Internazionale Pubblico e Privato (1949) 482, 483.

[57] See literature cited in Makarov, *op. cit., supra*, note 1, at 160.

[58] Cited *supra*, note 29.

the preliminary problem of choice between a democratic and an autocratic method of determining citizenship itself. Democracy postulates the freedom of the individual to choose his nationality, or at least his right to divest himself of an unwanted nationality. Although this is undoubtedly a political right, it is frequently justified—as is the most "political" of all concepts, the state—by ideologies borrowed from the field of private law, particularly the law of contract.[59] The theory has been advanced that citizenship originates in a contract between the individual and the state, that under certain conditions the contract may be terminated, that justified reliance on the apparent existence of citizenship should be protected, etc. Of course, if "public law" is identified with the area of legal compulsion, and "private law" with legal relationships established by consent, it may be proper to say that many nationality rules (suffice it to mention the rules on naturalization) are of a "private law" character, or, in less legalistic terms, protect individual rights.

Since there has been in recent times a growing stress on individual rights, on the one hand, and a rise in nationalism, expressed in an increasing emphasis upon state sovereignty and state interest, on the other, there has been no consistent adherence, in theory, legislation, or decisional law, to either the so-called "public law" or to the so-called "private law" conception of nationality.[60] The interpretations of legislative provisions are confusing. Thus, in Switzerland, the historical basis of the principle that the civil status of persons is to a large extent govened by their *lex patriae* has been said to lie in the fact that civil status is not merely a matter of private law but has an important bearing on public law.[61] On the other hand, in France, the jurisdiction of civil tribunals to determine nationality has been justified on the ground that "in view of the character of the bond of allegiance, nationality is considered as an element of personal status."[62]

PROTECTION OF INDIVIDUAL INTERESTS

The foremost field of application of individual freedom in modern nationality law may be found in the principle of *voluntary expatriation*

[59] On the other hand, the doctrine of perpetual allegiance has been also often based on the idea of "a mutual compact between the government and the citizen or subject, which it is said cannot be dissolved by either party without the concurrence of the other." Inglis v. Trustees of the Sailor's Snug Harbour, 3 Pet. 99, 7 L. Ed. 617 (1830), at 124.

[60] For an example of such ambivalence in our own law, see Moser v. United States, 341 U. S. 41 (1951), where the Supreme Court held that appellant did not "waive" his "rights to citizenship" by filing an application for exemption from military service as a citizen of Switzerland, but, at the same time, emphasized that "The qualifications for and limitations on the acquisition of United States citizenship are a political matter." *Supra*, at 46.

[61] Knapp, La Compétence Internationale des Tribunaux Suisses dans les Questions d'État-Civil des Étrangers Domiciliés en Suisse (1946).

[62] See Exposé des motifs, Code of French Nationality, cited *supra*, note 10.

which confers upon the individual the right to divest himself of his nationality by acquiring another. Most countries behind the Iron Curtain make loss of citizenship dependent upon a discretionary release from citizenship. The Polish Nationality Act of 1951 specifically declares that "A Polish citizen can acquire foreign nationality only after securing permission of the Polish authority for the change of nationality,"[63] and this provision should be read together with the Polish rejection of the concept of dual nationality. The law of the Soviet Union contains no provision for loss of Soviet nationality by acquisition of a foreign nationality.[64] France and the United States have pioneered the idea that voluntary expatriation is the landmark of freedom in nationality matters[65].

In France, under the Civil Code, nationality was lost by residence abroad without intention to return. Since domicile implies an element of will, it has been suggested that there is implicit in the dependence of nationality on domicile a legal recognition of the consensual nature of the bond of allegiance.[66] The Civil Code provisions for loss of nationality by abandonment of domicile are no longer in force. But since the Law of 1889, voluntary acquisition of a foreign nationality has automatically resulted in loss of French nationality.[67]

In the United States, the right of voluntary expatriation originated in the same liberal ideology as did freedom of migration or "freedom of locomotion," from which the citizen's right to obtain a passport was recently held to be derived.[68]

The right of voluntary expatriation is also recognized in Germany, provided that the person concerned has neither residence nor a place of abode within German territory.[69] The principle of automatic

[63] Art. 11, Law of January 8, 1951, cited *supra*, note 38. However, in Poland this provision is not new.

[64] Until the enactment of the Nationality Act of 1938, the Soviet law contained a rather unusual provision declaring that persons naturalized in the Soviet Union have neither rights nor obligations flowing from their foreign nationality. Art 11, Nationality Act of October 29, 1924; Art. 4, Nationality Act of June 13, 1930; Art. 4, Nationality Act of April 22, 1931 (for citations see *supra*, note 3). Nothing was said concerning the fate of the Soviet nationality of a person acquiring a foreign nationality. The provision for loss of foreign nationality in the case of acquisition of Soviet nationality has not been repeated in the Nationality Act of August 19, 1938 (cited *supra*, note 3). Since in countries in which the nationality law is statutory, grounds on which nationality may be lost may be assumed to be limited to those enumerated in statutes, it would seem that Soviet nationality cannot be lost by voluntary expatriation.

[65] Today, of course, many countries adhere to this idea.

[66] On this see Vanel, Histoire de la Nationalité Française d'Origine (1945) 93.

[67] Now art. 87, Nationality Code, 1945.

[68] Shachtman v. Dulles, 225 F. 2d 938 (App. D. C., 1955).

[69] Section 25, Reich and State Nationality Law of 1913, cited *supra*, note 30.

expatriation by acquisition of a foreign nationality is further qualified by the so-called *lex Delbrueck*,[70] whereby an individual may retain German nationality in spite of naturalization abroad, if, prior to acquisition of foreign nationality, he secures written consent to such retention from the German authority. Theoretically, this provision does not impair the individual's right to expatriation. But, in realistic terms, it impairs his chances of acquiring a foreign nationality.[71]

Switzerland grants a right to secure a release from nationality upon acquisition (or assurance of future acquisition) of a foreign nationality.[72] England grants to dual nationals a right to renounce citizenship of the United Kingdom and Colonies.[73] On an international level, the right of expatriation was enunciated in the provision of article 15(2) of the Universal Declaration of Human Rights, that "No one shall be . . . denied the right to change his nationality."

The problems involved in the right of voluntary expatriation are not limited to the right of changing one's nationality, i.e., of losing one nationality by acquiring another. The question has also been raised whether an individual has a *right to become stateless*, if he so desires.[74] No such right is generally provided for in France, Switzerland, or England. Nor has the United States ever asserted the right to become stateless to be an universal or inherent right of man.[75] Indeed, at an early stage, the idea of state-

[70] Subdivision 2 of Section 25, *lex cit.*

[71] Since the preservation of German nationality can be kept secret, an opening is made for sham expatriations. Such expatriations allegedly proved useful to German agents abroad during the first world war. Under these circumstances, other countries have been reluctant, especially in times of war, to grant nationality to German nationals. See Lacombe, Comment, 15 Nouv. Rev. de dr. intern. privé (1948) 348. In fact, with obvious reference to the *lex* Delbrueck, Belgium and Luxemburg (in a sense, also Switzerland) bar naturalization in cases where petitioner has secured permission to retain his nationality. See Lichter, Die Staatsangehörigkeit nach deutschem und ausländischem Recht (12th rev. ed. 1955) 138–139.

[72] Art. 42, Swiss Nationality Act 1952 (*supra*, note 29). In addition to showing that he has acquired a foreign nationality or that such nationality was promised to him, the petitioner must prove that he is at least twenty years old and that he is no longer domiciled in Switzerland. Exceptions to the rule whereby Swiss citizenship is not automatically lost by acquisition of a foreign nationality are contained in articles 8 and 9, *lex cit.*

[73] The renunciation becomes effective upon registration, which the Secretary of State is required to cause to be made (he may withhold it in time of war). Section 19, British Nationality Act, 1948, 11 & 12 Geo. 6 Ch. 56.

[74] In the nineteenth century, the idea gained ground that no one has the right to be stateless. Lerebours-Pigeonnière, *op. cit.*, *supra*, note 52, at 68.

[75] The United States Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. §§1101–1503, contains a novel provision (8 U. S. C. §1481 (a) (7)) that citizenship may be renounced in written form before certain officers, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense. Prior to that Act, nationality could be renounced only by declaration abroad before a diplomatic or consular officer. §801 (f), Nationality Act of 1940, 8 U. S. C. §1481 (a) (6).

lessness seems to have been regarded as absurd. A person losing nationality without acquiring a new one was assumed to have become "a citizen of the world" rather than a citizen of no country.[76]

In Germany, except in enumerated cases, a national has a legal right to be released from nationality even if he would thereby become stateless.[77] Under the Bonn Constitution, Germany has advanced an additional step in recognizing an individual's right to elect statelessness in certain cases. Under the basic German Nationality Act of 1913, a German woman who married an alien lost German nationality, whether or not she acquired another nationality by virtue of such marriage.[78] However, under article 16 of the Constitution of the Federal Republic of Germany, which incorporated the provision of article 15 of the Declaration of Human Rights that no one may be arbitrarily deprived of his nationality, the woman who, by her marriage has not acquired a foreign nationality, keeps, in principle, her German nationality. But, until April 1, 1953, she could, by appropriate declaration, elect to become stateless.[79] This right of election has apparently become obsolete since that date, when the constitutional provision establishing the equality of men and women (Art. 3(2)) became effective (Art. 117(1)), repealing the provision for loss of nationality by marriage to an alien.[80]

A French court has advanced the doctrine—said to have universal validity—that a person once become stateless has a right to remain stateless. It held[81] that Allied occupation authorities, acting for the German Government, could not impose German nationality upon Jews deprived of such nationality by the Eleventh Regulation under the Reich Citizenship Law.[82] The court said that while, by international law, the

[76] In Talbot v. Jansen, 3 Dall, 133 (1795), in considering the citizenship of one Ballard who claimed to have expatriated himself as a citizen of the United States, the Supreme Court of the United States said (at 152-3):

"Who is he? A citizen of the United States: For, although he has renounced his allegiance to Virginia, or declared an intention of expatriation . . . yet he had not emigrated to and become the subject or citizen of, any foreign kingdom or republic . . . Ballard was, and still is, a citizen of the United States; unless perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times."

And compare the arguments and opinion in Stoeck v. Public Trustee, cited *supra*, note 5, which show that in 1921 it was still debatable whether "statelessness" was at all conceivable.

[77] Section 22, subdiv. 2, Reich and State Nationality Law of 1913, cited *supra*, note 30.

[78] Section 17, Number 6, Reich and State Nationality Law of 1913, *supra*.

[79] This interpretation of article 16 of the Constitution is contained in the Circular Decree of the Federal Minister of the Interior of October 7, 1950, concerning Nationality of German Women who Marry Aliens (Sammelblatt, Nr. 2 v. 13.1.1951, at 70 *et seq.*).

[80] See Lichter, *op. cit.*, *supra*, note 71, at 119, 120.

[81] Terhoch c. Daudin et Assistance publique, Cour d'Appel de Paris (6e ch. suppl.), Feb. 8, 1947, 15 Nouv. Rev. de dr. intern. privé (1948) 203.

[82] Cited *supra*, note 8.

power of states to regulate nationality is quasi-discretionary, "that power is limited in civilized countries by the rights of human personality and by the free choice which man ought to have after majority to be or not to be readmitted into a nationality of which he was deprived."[83]

While the right of voluntary expatriation is the most important instance of the principle of consensual citizenship, the latter has been also occasionally discussed in connection with particular types of acquisition of citizenship. Thus, acquisition of citizenship resulting from domicile within a country was considered in France to be an *acquisition* by choice. Of course, the principal methods of acquiring citizenship, that is, acquisition at birth *jure sanguinis* or *jure soli*, are hardly consensual in nature, though arguments may be found claiming the one or the other method to be consensual.[84] These arguments are mostly based on the fiction that an individual would, if given a choice, elect the nationality of his parents or that of the country of his birth. Consensual acquisition of nationality at birth is not wholly fictional in those instances where an individual is granted a choice of nationality when he reaches the age of reason but with retroactive effect. Such instances may be found in the French law permitting certain persons within six months before reaching majority to renounce French nationality.[85] Apart from cases of naturalization upon petition, the freedom of individual choice in acquiring nationality is also

[83] The nationality status of persons expatriated by the National Socialist regime was for a long time uncertain and controversial. Compare Salwin, "Uncertain Nationality Status of German Refugees," 30 Minn. L. Rev. (1946) 372. Until laws were passed in 1948 on the basis of Articles II and III of Proclamation No. 4 of the American Military Government of March 1, 1947, in conjunction with Proclamation No. 2 of the American Military Government of September 9, 1945, whereby the expatriated persons were granted a right to claim their previous nationality, some courts in Switzerland and France disregarded the loss of nationality under the Eleventh Regulation as a nullity, while others recognized it. Those which considered it as a nullity sometimes relied on Law No. 1 of the American Military Government which abolished National Socialist doctrines and principles. The decision in the *Terhoch* case was principally based on "the fact that the laws which repeal Nazi legislation, destined . . . to abolish the iniquities of the National Socialist regime, cannot result in an aggravation of the position of those who were its victims." The position uniformly accepted at present is that persons deprived of German citizenship by the Eleventh Regulation have not been reinstated as German citizens unless they apply for such reinstatement (or, under present German law, return to Germany and establish their residence there). In France, see Gunguène c. Demoiselle Falk, Cour de Cassation (Ass. plén.), December 20, 1950, [1951] Gaz. Pal. (1er sem.) Jurisprudence 50; [1951] Dalloz Sommaires 19, and see note indicating that the Cour de Cassation (section sociale de la chambre civile) repeatedly held to the contrary but that courts of second instance refused to follow these holdings. In Switzerland see Rosenthal g. Eidg. Justiz- und Polizeidepartement, *supra*, note 36.

[84] Chief Justice Fuller, dissenting in United States v. Wong Kim Ark, *supra*, note 45, at 705, 711–714, claimed that the *jus soli* sanctioned by the majority and attaching citizenship to the accident of birth within a territory is incompatible with the right of expatriation.

[85] Articles 19, 20, 24, 25, 26, Nationality Code, *supra*, note 10.

safeguarded in option rights accorded under international treaties.[86] Popular choice of the sovereignty which is to govern a territory is another instance in which individuals participate in the determination of their nationality.[87]

Concern with individual interest—whether it be the interest of the person whose nationality is in issue or that of third parties—is expressed in provisions for the protection of reliance on "*apparent citizenship*," although there are instances in which the state's "reliance" is the object of protection.[88] Thus, the French Nationality Code contains rules for the protection of rights acquired on the faith of an individual's nationality while he is not, in fact, a national.[89] *In Moser v. United States*,[90] the Supreme Court held an individual's reliance on an erroneous interpretation of our statutes by the State Department that he would not forfeit his "rights to citizenship" by claiming a draft exemption as a national of a neutral country, as deserving protection. The Swiss Federal Tribunal has held[91] that where the competent Zurich authority had in 1939 formally, though erroneously, recognized petitioner as a Swiss citizen, she having relied on such recognition, actually became a Swiss citizen.[92] The new

[86] Such option rights were frequent under the treaties which concluded the first world war. Compare also Treaty of February 2, 1951, between France and India, whereby the former ceded to the latter the Free City of Chandernagor. [1951] Journal Officiel 6717.

[87] An example of such election may be found in the Franco-Italian Peace Treaty of February 10, 1947. See Treaties and Other International Acts Series, 1948, Department of State Publication 2960. For French law implementing the treaty provisions concerning nationality see Law No. 47-2326 of Dec. 13, 1947, [1947] Journal Officiel 12174.

[88] The famous English case of James Joyce (Joyce v. Director of Public Prosecutions, [1946] 1 All E. R. 186) may be rationalized on this basis. Joyce was convicted of treason as a person owing allegiance to the King, although he never was a British subject in fact, but merely held himself out as such and invoked British protection by using a British passport which he obtained by fraud.

[89] Articles 26, 39, 42, Nationality Code.

[90] Cited *supra*, note 60.

[91] Bertha Schaufelberger c. Eidgenössisches Justiz- und Polizeidepartement, Schweizerisches Bundesgericht, September 23, 1949, BGE 75 I 284 (1949).

[92] At the time when the Zurich authority determined Bertha Schaufelberger's nationality to be Swiss, that authority had jurisdiction to make such determinations. Art. 6, Resolution of the Federal Council of November 11, 1941 (cited *supra*, note 36) later conferred upon the Federal Justice and Police Department exclusive authority to determine whether or not a person possesses Swiss citizenship, subject to petition for review by higher authority. The Department held the determination of the Zurich authority to have been erroneous. The Federal Tribunal pointed out that there was no indication in the law whether or not a decision of the competent cantonal authority was reversible; that, however, it was the general policy of the law—evidenced by the fact that acquisition of nationality by marriage or naturalization could be annulled only in exceptional cases, under specified conditions and within a limited period—to afford legal security. The petitioner's reliance on the decision of the competent authority entitled her to protection. The court said (*supra*, at 289):

Swiss Nationality Act[93] grants the benefit of facilitated naturalization to an alien who, for at least five years, believed in good faith that he was a Swiss citizen, and during that time was treated as such citizen by the cantonal and communal authorities.

In spite of the emphasis placed on the "public law" character of nationality under the new French Nationality Code, *actions concerning nationality* continue to be *adjudged by civil courts*,[94] and this to the extent that if a question of that nature arises before a different tribunal, the latter must postpone decision until the nationality issue is decided by the competent civil court.[95] Yet, a judge must *ex officio* raise the question of nationality, this being a matter of public interest (*d'ordre public*).[96] In contrast, questions of nationality in Germany, being regarded as belonging to the sphere of public law, are adjudicated by administrative tribunals.[97]

Unlike the United States, most countries do not grant "*rights to naturalization.*"[98] The Minister of Justice in France must state the grounds if he rejects an application for naturalization or readmission to nationality as not meeting statutory requirements,[99] but he may, in his discretion, reject an application which does meet these requirements, without stating

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"Petitioner had in good faith relied upon the formal recognition of her Swiss citizenship by the competent Zurich authority and for years availed herself of the right thus recognized. She has a claim to protection of her reliance upon the official declaration once made that she s a Swiss citizen."

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Under the Nationality Act, 1952 (art. 49), cantonal authorities have jurisdiction to declare whether or not an individual possesses Swiss citizenship. Such declarations are subject to review by the Federal Tribunal (art. 50(2)(c), *lex cit.*)

[93] Art. 29, Swiss Nationality Act, 1952.

[94] Art. 124, Nationality Code.

[95] Art. 125, *lex cit.*

[96] In England, under Section 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, the courts have jurisdiction to determine the question whether a person is a subject of His Majesty and any questions preliminary thereto. 15 & 16 Geo. 5 Ch. 49, as amended by omission of the term "natural-born" preceding the word "subject" in the British Nationality Act, 1948.

[97] This is based on their jurisdiction to determine disputes between the state and the subject. See Makarov, *op. cit., supra*, note 1, 357 *et seq.*

[98] While in the United States naturalization has been often referred to as a "privilege" rather than a matter of right (see, *e.g.*, United States v. Anastasio, 226 F. 2d 912, 919, C. C. A. 3d, 1955), that privilege is one granted by Congress rather than by judicial or administrative authorities. "Congress alone has been entrusted by the Constitution with the power to give or withhold naturalization and to that end 'to establish a uniform Rule of Naturalization.' Art. I, §8, Clause 4." Baumgartner v. United States, 322 U. S. 665 (1944), at 672. See also United States v. Ginsberg, 243 U. S. 472 (1917), at 474; State *ex rel.* Weisz v. District Court *et al.*, 61 Mont. 427, 202 Pac. 387 (1921).

[99] Art. 115, Nationality Code.

any reason therefor.[100] Rights to be naturalized were abolished in Germany under the National Socialist regime by the Law of May 15, 1935, amending the Reich and State Nationality Law,[101] which specifically declared: "There is no right to be naturalized." A recent German law grants such right to a certain group of persons whose status has become rather inchoate due to peculiar postwar conditions.[102]

PROTECTION OF PUBLIC INTEREST

Reorientation toward a "public law" conception of nationality, with stress upon public interest, is particularly noticeable in France. In French theory and decisional law preceding the new trend, there was general agreement that nationality irrevocably attributed at birth is a vested right, while nationality attributed subject to a right of renunciation is not.[103] In the parliamentary debates of 1927, the legislators took the position that any attribution of nationality is "a prerogative of sovereignty whose consequences affect the structure of the country."[104] Under the present Nationality Code, there is *no vested right in nationality*.[105] However, there are, as shown above, rights acquired in reliance on the apparent nationality of a person.

The present French rule that there is no vested right in nationality may be said to run counter to the principle enunciated in article 15, subdivision 1, of the Universal Declaration of Human Rights, that "Everyone has the right to a nationality," and would be clearly inadmissible under the constitutional law of other countries. Thus, article 16, subdivision 1, of the Constitution of the Federal Republic of Germany declares: "No one may be deprived of his German citizenship."[106]

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[100] Art. 116, *lex cit.* In England, the Secretary of State is not required to assign any reason for granting or refusing a certificate of naturalization, and his decision is not appealable. Section 26, British Nationality Act, 1948, cited *supra*, note 73. In Switzerland, the decisions of the Federal Justice and Police Department, refusing naturalization, are required to state the grounds of refusal (Art. 37(3), Act of 1952, cited *supra*, note 29), but they are subject to review only upon motion of the interested cantonal government (art. 51, *lex cit.*)

[101] [1935] Reichsgesetzblatt pt. I at 593.

[102] Law of February 22, 1955, Regulating Questions of Nationality, [1955] Bundesgesetzblatt pt. I at 65. Such right is granted primarily to persons who are "Germans" but not German nationals within the meaning of art. 116(1) of the Constitution (compare *supra*, text at note 19) (Sect. 6, *lex cit.*). It is also granted to persons who cannot be expected to return to their homeland (Sect. 8, *lex cit.*) and to other persons of German stock who qualify as expellees or emigrees (Sect. 9, *lex cit.*)

[103] See Boulbès, *op. cit.*, *supra*, note 46, at 8.

[104] Chambre des deputés, Journal Officiel, déb. parl., de 1927, p. 1100, col. 1.

[105] Boulbès, *op. cit.*, 8.

[106] The provision continues: "Citizenship may be lost only pursuant to a statute and,

Closely connected with the principle accepted in France that there is no vested right in nationality is the *freedom of the legislator to give to nationality legislation retroactive effect.* The French law on the attribution of nationality at birth applies to all persons who were less than twenty-one years of age (age of majority) on the date when the law became effective.[107] But courts have construed the retroactivity provision narrowly.[108] In other countries, nationality legislation is usually not retroactive,[109] and in some, retroactive nationality legislation might be regarded as unconstitutional.

The change of orientation toward a "public law" conception of nationality first found expression in France in a revision of the rules concerning the *effect of putative marriages upon nationality of women and children.* In the older legal literature and decisional law, the opinion prevailed that in the case of a putative marriage the nationality of the wife and children is governed by the civil law rule applicable to such marriages,[110] that nationality being "*un effet civil du mariage*"—a private law consequence of marriage—the wife (who contracted the marriage in good faith) and children acquire the French nationality of the husband and father.[111] This position was overruled by more recent decisional law, and the Nationality Code now establishes the principle that a void marriage, even if contracted in good faith, does not confer French nationality upon wife and children.[112] This departure from civil law principles is particularly striking as applied to children of putative marriages. In the field of

against the will of the person concerned, only if he is not thereby rendered stateless." For a most interesting decision holding 8 U. S. C. §801(e) of the United States Nationality Act, 1940, providing for forfeiture of United States citizenship by voting in a foreign election, unconstitutional in dual citizenship cases, because outside the power of Congress, which has been given merely the power "to confer citizenship, not a power to take it away," see Terada v. Dulles, 121 F. Supp. 6 (D. C., Hawaii, 1954).

[107] Art. 3, Nationality Code. This applies only to attribution of nationality at birth, not to acquisition by virtue of events occurring after birth. Art. 4, *lex cit.*

[108] Matter of Segalini, Tribunal Civil de la Seine, Dec. 22, 1950, [1951] Dalloz Sommaires 36. Compare Ferrazi c. Ministère public, Cour de Cassation (Ch. civ., Sect. civ.), Feb. 20, 1951, 42 Revue critique de droit international privé 366 (1953), in which case, however, the principle of nonretroactivity applied by the court worked to the disadvantage of the petitioner.

[109] The Swiss Nationality Act, 1952 (art. 57(1)) expressly states that it has no retroactive effect.

[110] Arts. 201, 202, Civil Code.

[111] See Boulbès, *op. cit., supra,* note 46, at 18, 19.

[112] Arts. 42, 43, Nationality Code. The reason of that rule, as advanced by Aymond ("La nouvelle loi française sur la nationalité," 14 Nouv. Rev. de dr. intern. privé 198 (1947), at 211, 212), is that nationality being a matter of public law, cannot depend on the motives of the persons concerned, except in cases where the law itself recognizes individual will as relevant.

civil law, it is now accepted in most countries that children from void marriages concluded in good faith are deemed legitimate,[113] and several countries have even gone so far as to regard the children as legitimate although the marriage was concluded in bad faith.[114] Thus, in France a child of a putative marriage has a dual status. It is legitimate for civil law purposes and illegitimate for purposes of nationality law.[115] By contrast, the Swiss Nationality Act, 1952, expressly provides that when a marriage of an alien woman to a Swiss citizen is declared void, the wife who contracted it in good faith is deemed to have acquired Swiss citizenship and that the children are Swiss citizens even if both parents acted in bad faith.[116]

Stress upon public interest in nationality matters in France is also expressed in the rule providing that in order to constitute a parent-child relationship for purposes of nationality law, recognition of an illegitimate child must meet the requirements of French law,[117] although, for purposes of the civil law, compliance with foreign law standards of recognition may be sufficient.

The dual status resulting from the use of different standards in nationality law from those applied in civil law is in most instances a disadvantage to the individual concerned. Similarly, disregard in nationality legislation of the *phenomenon of dual national status* may adversely affect individual interests. Dual nationality may interfere with the security of an individual as much as does statelessness.[118] The Hague Conference of 1930 was con-

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[113] See articles 201, 202, French Civil Code; art. 128, Italian Civil Code.

[114] Article 133, Swiss Civil Code; Section 25, German Marriage Law (Ehegesetz), enacted by the Allied Control Council in Germany (Law No. 16 of Febr. 20, 1946, Off. Gaz. of the Control Council, No. 77).

[115] Again, as in the situation described above (note 34), it would be incorrect to say that the child is legitimate but does not acquire nationality. For the child may acquire nationality, but under a different provision from that applicable to a legitimate child. It has the same status in nationality law as an illegitimate child in cases where parenthood has been established as to the father and as to the mother by the same judgment or by the same act of recognition. It is hence French if the father is French. *Cf.* art. 28, Nationality Code.

[116] Art. 3(2) and (3), Swiss Nationality Act, 1952.

[117] See *supra*, text at notes 33, 34.

[118] Dual nationality may create conflicting obligations. Unless protection is afforded by international treaties, a man may be tried for treason in one country for performing military service in another country, although he may not have known that he was also a national of the former. Note, however, that in United States v. Tomoya Kawakita, 96 Fed. Supp. 824 (D. C., S. D. Calif., 1951), affd., Tomoya Kawakita v. United States, 190 F. 2d 506, affd., 343 U. S. 717 (1952), the court instructed the jury (see instructions in 96 Fed. Supp. 847) that if it found that the accused, a dual national charged with treason against the United States, believed that he was not a citizen of the United States, it should acquit as intent would then be lacking.

cerned with both phenomena.[119] The best example of legislation evidencing concern with the problem is the former Swiss provision that a Swiss woman marrying an alien loses Swiss citizenship, unless such loss would inevitably render her stateless.[120] More recently, however, dual nationality has not seriously been considered a phenomenon to be avoided. Rather, in France for instance, the legislative policy is to confer nationality "in the public interest," although there is a high likelihood that dual nationality will ensue. Thus, in discussing the provision that a child born abroad of a French woman and an alien father is a French national,[121] the *Exposé des motifs* of the French Nationality Code states that any conflict of nationalities that may arise as a result of this provision, which "no one denies" to be "in the national interest,"[122] ought to be resolved on an international rather than on a municipal level.[123]

Another phenomenon motivated by public interest, if any, rather than individual right is the creation of *two classes of nationals* (native-born and naturalized), which is particularly noticeable in France.[124] In contrast thereto, Switzerland in her Constitution excludes differences in treatment of native-born and naturalized citizens.[125]

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[119] The Conference (a) adopted a Convention concerning certain Questions relating to the Conflict of Nationality Laws, and (b) drew up three Protocols, which deal with military obligations in certain cases of double nationality; a certain case of statelessness; and a special Protocol concerning statelessness.

[120] Art. 5, sections 1 and 2, Resolution of the Federal Council of November 11, 1941, cited *supra*, note 36. Art. 9 of the present Nationality Act, 1952 provides that a Swiss woman loses Swiss citizenship by marriage to an alien, if she either acquires his nationality by marriage or already possesses such nationality, provided that she does not file a declaration stating that she desires to preserve Swiss citizenship. In the latter event, of course, she may become a dual national.

[121] Art. 19, Nationality Code. The child has a right of renouncing French nationality. But since that right must be exercised within a definite period, failure to act within such period, due to inadvertence or ignorance, results in a final acquisition of nationality. Note that the period within which the right of renunciation must be exercised, precedes the attainment of majority.

[122] The Exposé des motifs adduces further reasons for adoption of the rule:

"It is justified by considerations of logic—for the child, whatever its place of birth, is partly of French blood—and by considerations of equity—for many French women, having lost their nationality upon marrying an alien, returned to France with their children after abandonment by the father, his death, a separation, or divorce. These children, who formerly had no recourse other than a petition for naturalization, should be considered as French nationals at birth."

[123] Compare also the Summary of Main Provisions of the Nationality Bill, 1948, presented by the Secretary of State for the Home Department to the British Parliament (Home Office, Feb. 1948, at 9): " . . . the United Kingdom Government see no objection to the possession of dual citizenship . . . "

[124] Art. 81, Nationality Code, dealing with disabilities of naturalized persons. And compare the United States provision for forfeiture of citizenship by residence abroad, which applies only to naturalized citizens. Cited *supra*, note 10.

[125] Art. 44(5), Federal Constitution. There is only the minor reservation pertaining to rights in common property acquired a long time ago.

It is also important to note the appearance of *punitive and political expatriation*.[126] Where an individual does not possess any other nationality and cannot be deported, this method of expatriation is futile.[127] Where it is restricted to naturalized persons, it creates two classes of citizens. The policy of states with regard to punitive and political expatriation has been a changing one. In Switzerland, by Resolution of the Federal Council of November 11, 1941,[128] the Federal Justice and Police Department was authorized to annul a naturalization or readmission to nationality within ten years of its occurrence, if the applicant was proved to have a "patently un-Swiss attitude" (*offenkundig unschweizerische Gesinnung*). The Nationality Act of 1952 did not incorporate this provision.[129] In France, the government may oppose an otherwise automatic acquisition of nationality by a person born and domiciled in France on the ground of "lack of assimilation" (*défaut d'assimilation*).[130] A Decree-law of September 9, 1939,[131] provided for the expatriation of "every Frenchman" who "conducts himself as a national of a foreign power," whether or not he possessed the nationality of such power.[132] Under the present law,[133] this applies only if

[126] Totalitarian countries have made abundant use of such expatriation. While expatriation or denaturalization is at present not considered to be penal in character, many of its grounds are related to crime, and its consequences are at times more serious than those attaching to certain crimes.

[127] Niboyet, *op. cit., supra*, note 52, item 354, at 450. The author admits that such expatriation may be justified in the case of political refugees who refuse to return to their country of origin. *Id.*, item 112, at 115, 116.

Cases of denaturalization may raise intricate problems of international law. For instance, where naturalization is revoked on the ground that it had been secured by fraud, analytically, it would seem that it must be deemed never to have occurred, so that the previous nationality of the person concerned revives. In Boissonas v. Acheson, 101 F. Supp. 138 (D. C., S. D., New York, 1951), see p. 143, the United States State Department took the position that, in case the French authorities declared petitioner's acquisition of French citizenship ineffective because of failure to satisfy certain form requirements, she would be deemed to have remained a United States citizen. But there seems to be no rule of international law requiring the state of the original nationality to readmit a person once formally naturalized by another state whenever the latter declares him denaturalized. It appears that Germany, for instance, would not recognize denaturalization abroad as a ground of readmission of a former national. See Lichter, *op. cit., supra*, note 71, at 137, drawing attention to the fact that the Bancroft Treaties did not provide for such revival of the original nationality in case of denaturalization abroad.

[128] Art. 2 of the Resolution cited *supra*, note 36.

[129] Under that act (art. 41), a naturalization may be annulled within five years in case of fraud or of concealment of essential facts.

[130] Art. 46, Nationality Code. Such failure to acquire nationality, though not technically an expatriation, has a very similar impact.

[131] [1939] Journal Officiel 11400.

[132] The provision was clearly motivated by the national emergency prevailing at the time of enactment. See report of the Minister of Justice, advocating the enactment of the provision. [1939] Journal Officiel 11400.

[133] Art. 96, Nationality Code. It is worth noting that in this instance a native-born national may be deprived of nationality by executive decree. Contrast art. 95, *lex cit.*

the person concerned also possesses such foreign nationality, so that the provision now is in effect a rule for the resolution of conflicts in nationality matters.

Significant for evaluation of the trends underlying present nationality legislation is the *procedure of expatriation*. In France,[134] for instance, the Law of August 10, 1927,[135] gave the individual whose nationality was to be revoked the protection of a judicial procedure. The suit had to be brought in the name of the Minister of Justice before the *Chambre du Conseil* of the civil tribunal of the last-known residence of the defendant, who enjoyed the benefit of the safeguards accorded to the accused by the criminal procedure prescribed by the law of December 8, 1897. The Decree-law of November 12, 1938,[136] and the Law of July 16, 1940,[137] authorizing the government to pronounce forfeiture of nationality by decree, have abolished this guarantee of judicial process.[138] Under the present law, denaturalization is an administrative function.[139]

Proof of Foreign Nationality

No attempt is made in the present paper to deal comprehensively with the intricate question of proof of foreign nationality.[140] The aim is rather to draw attention to certain aspects of comparative nationality law which may suggest new approaches to the problem of such proof.

While most authorities posit certain fundamental principles of international law, such as that of voluntary expatriation, to limit a state's right to grant or deny its own citizenship,[141] there is general agreement that beyond such limitations that right is an incident of sovereignty that must be recognized by other countries,[142] so that "(w)hether a person is a

[134] On the development of this procedure in France see Lerebours-Pigeonnière, *op. cit., supra*, note 52, at 133.

[135] Cited *supra*, note 53.

[136] [1938] Journal Officiel 12920.

[137] [1940] Journal Officiel 5434.

[138] It is interesting to note that the reason advanced for the change of procedure is that the former one was embarassing. In the fourth edition of his Précis de Droit International Privé (1946), Lerebours-Pigeonnière stated (at 149) that proceedings before courts, although conducted *en Chambre du Conseil*, involved the risk of giving rise to "*des commentaires tendancieux*" and of provoking "*un scandale*." In the sixth edition (cited *supra*, note 52, at 133) the author refers solely to the first.

[139] Arts. 121, 122, Nationality Code.

[140] On proof of nationality before international tribunals see Briggs, *op. cit., supra*, note 5, at 466–473, and literature cited there. But the rules as to proof before such tribunals are not necessarily applicable in municipal courts or administrative agencies dealing with the question of foreign nationality.

[141] The extent to which this right is limited by international law is highly controversial. This problem will be the subject of a separate paper.

[142] See Murarka v. Bachrack Bros., *supra*, note 5, and authorities cited.

national of a country must be determined by the municipal law of that country."[143] Indeed, the idea expressed in *Stoeck v. Public Trustee*[144] that "there is not and cannot be such an individual as a German national according to English law" has deeply penetrated legal thought on conflicts in nationality matters and on proof of foreign nationality.

The stated pronouncement of Russel J. in the cited case requires reformulation. While courts and administrative agencies in most countries pass daily upon the nationality status of foreign nationals, the effect of such decisions is necessarily limited. Their impact on other domestic and foreign determinations may vary in different legal systems, but it is never as comprehensive as a determination made within the country whose nationality is in issue. In general, only the latter country can determine a person's status as its national for most, if not all, purposes in which nationality may be relevant under its legal system and indirectly also for purposes under which such "foreign" nationality may be decisive in other countries. Beyond that, there is no absurdity whatever in the concept of an individual being "a German national according to English law," as is demonstrated by the numerous cases in which English—as well as other—courts have held persons to be German nationals where they were not such nationals under German law.[145] Specifically, the status of being "a German national according to English law" is subject to two important qualifications. It will not affect determination of German nationality status for purposes of, e.g., German military draft legislation in Germany or for the conflicts law of other countries in which German nationality constitutes a decisive contact. Indeed, in Switzerland, for instance, the rule prevails that determinations of domestic courts concerning the foreign nationality of a person are not binding even in other cases before Swiss courts.[146] Where no such rule prevails, however, there is no reason to deny

[143] Stoeck v. Public Trustee, 2 Ch. 67 (1921), at 82.

[144] *Supra*, note 143. The celebrated passage from Russel J.'s opinion reads as follows:

"There remains for consideration the contention that the words 'German national' in the Treaty of Peace Order, and s. IV. of Part X. of the Treaty of Peace, mean or include a German national according to English law. I confess I have difficulty in following this. Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law. . . "

[145] See *supra*, text at and notes 36, 37.

[146] In Dame Levita-Muehlstein c. Département fédéral de justice et police, cited *supra* note 36, the Federal Tribunal said (at 411):

"Swiss authorities may examine the question whether a given person possesses a foreign nationality only as an issue incidental to decision of another question which is within their

effect to a domestic determination of a particular foreign nationality in a previous case to which the person concerned was a party. Secondly, even where "German nationality according to English law" is in issue, an English court will apply, at least in part, the standards of German law.[147] Thus, in the cases referred to above, Swiss and English courts, while disregarding the German expatriation provisions, applied the German law conferring German nationality on the individuals concerned. Also, an English court will normally accord great weight to a determination made by German authorities that an individual is or is not a German national.

The foreign law to which a court must look in order to determine nationality comprises not only general provisions but also constitutive individual grants or deprivations of nationality. There is no reason in this context to distinguish between a naturalization decree issued in an individual case and a general law defining nationality, particularly as instances occur of individual naturalization by legislative,[148] as well as by judicial or administrative act.

To be distinguished from such constitutive individual acts are declaratory acts, which determine that an individual is or is not a national of the country in which the declaration is made. To this group belong declaratory judgments and certificates of nationality. The effect to be given to them is determined in the first place by the rules which are generally applicable to recognition of foreign judgments and foreign certificates establishing a status. Analytically, to be sure, every declaratory act of a competent authority is, in a sense, also constitutive. But its constitutive effect may be, on the one hand, more limited in substantive scope, and, on the other hand, more extensive in time. In fact, in contrast to naturalization, a declaration of nationality is generally retrospective and for this reason should be scrutinized with greater care than prospective acts.

It should be noted, however, that in some instances, a declaratory act, in the usual sense of the term, will have constitutive effect within the country of declaration. This was the case, for example, where the compe-

jurisdiction. Their decision on this point (the question of foreign nationality) is hence but a mere ground upon which decision on the issue in litigation is based; it does not have the import of a determination of an issue contained in a decision which becomes authoritative (Citation). It is not *res adjudicata*. Hence, each of the authorities called upon to decide such an issue as an incidental question decides without being bound by the incidental decision that another authority may have previously rendered on the same subject."

[147] See Art. 2 of the Hague Convention of April 12, 1930, *supra*, note 5.

[148] Thus, e.g., in Luxemburg individual naturalizations are decided upon by the legislature-Art. 13 of the Law of March 9, 1940, concerning Luxemburg Nationality (Mémorial du Grand. Duché de Luxembourg, 26 mars 1940, p. 211).

tent cantonal authority erroneously declared a person to be a Swiss citizen. The Swiss Federal Tribunal held[149] such declaration to be binding, and thus an apparently declaratory act in effect created a nationality status which did not previously exist. When the question of French nationality, being directly in issue, has been adjudged, with finality, by a competent French civil court in a suit between that individual and the state, the judgment, if it should later develop to have been erroneous, will be regarded as tantamount to a ground of acquisition or of loss of French nationality.[150] The question may thus arise whether domestic courts should give such acts, which are constitutive under the law of the country of declaration, the same effect as they accord to foreign naturalizations. It is believed that within the limits set out below, they should certainly accord great weight to the constitutive character of such declarations but, at the same time, consider the fact that such declarations are comparable to retroactive naturalizations or expatriations.

In general, with regard to declaratory acts, consideration should be given, in the first place, to the probative force of a particular determination within the country whose nationality is in issue. Its weight there may be predicated upon the scope of authority of the agency making it, the status of the parties to the proceeding, and the question whether nationality is directly or only indirectly in issue. Thus, under French law, in order to be conclusive as against the world, a determination of nationality must be made by a civil court in a suit between the individual concerned and the state, in which his nationality is directly in issue. That an individual's nationality status is implied, as a matter of clear inference, in a former decision (regarding another person) has been held not to be sufficient to render the matter *res judicata*.[151] Nor is the ruling of a French

[149] Bertha Schaufelberger c. Eidgenössisches Justiz- und Polizeidepartment, *supra*, note 91.

[150] See note to Veuve Israel et autres c. Maurice Israel, in [1949] Dalloz Jurisprudence 329.

[151] Veuve Israel et autres c. Maurice Israel, Cour de Cassation (Ch. Civ., Sect. Civ.), May 24, 1949, [1949] Dalloz Jurisprudence 329. In 1906, a French Consular Court in Alexandria decided in a suit brought by Vita and Maurice Israel that Abraham Israel, who died a resident of Egypt, was a French subject but not a French citizen, and that succession to his estate was consequently governed by Jewish law, as his personal law. In 1924, a French court in Aix decided in a litigation to which the French state was a party that Raymond Israel, a grandson of Abraham and son of Maurice Israel, was not subject to military duty, since he was not a French national, neither his father nor his grandfather having been French. In 1930, Vita died in Paris, and in a suit involving succession to his estate the question arose whether he was French. If he was, he was a French citizen (note that this is not identical with being a French national; compare *supra*, at 413, and note 15) and his heirs were those persons who qualified as heirs under French law, i.e., his widow and daughter; if he was not French, succession to his estate was governed by Egyptian law, according to which his brothers would

criminal court that an individual is or is not a French national binding *erga omnes* even in France.[152] Should then any evidentiary value on the issue of French nationality be denied in other countries to a judgment of a French civil court determining the nationality status of the litigant's ancestor, from whom, under French law, he derives nationality, or to a French criminal judgment involving the litigant himself? Such judgments might be considered for whatever their intrinsic value may be.

While it is thus proper, in deciding upon the credit to be given to determinations of authorities of a foreign country regarding matters of its nationality, to consider the effect there accorded to such determinations, it is by no means necessary that they should be accorded the same probative value abroad as they have in the country of issuance. In France, for instance, possession of a duly issued certificate of nationality creates a presumption that the holder is a French national and places the burden of proving the contrary upon the opponent.[153] It seems, however, that assuming the law of a foreign country to be similar to French law, French courts would not consider the holder of a foreign certificate of nationality as entitled to the benefit of the presumption but would decide the issue as any other issue of fact.[154]

Nor, on the other hand, need the credit given to a foreign determination of nationality be proportionate to the probative force accorded to similar determinations issuing from domestic authorities, unless the terms under which such determinations are made are shown to be similar. In *Murarka v. Bachrack Bros.*,[155] Judge (now Mr. Justice) Harlan, in according presumptive credit to a nationality certificate issued by the Indian consul, justified this position by reference to provisions of United States statutes for the issuance of certificates of nationality by certain designated officers. But this statement seems merely to suggest that certificates of the indicated type are customarily issued in international relations.

Even though a foreign nationality determination may fulfil all the formal prerequisites of credit, courts and administrative agencies in other countries should further consider the circumstances under which it

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inherit. The court below decided in favor of the brother, Maurice, thereby relying on the 1924 judgment rendered in Aix, which incidentally held Vita's father, Abraham, not to have been French. The Cour de Cassation reversed on the ground that the only nationality conclusively determined in the 1924 judgment was that of Raymond, for it was directly in issue between Raymond and the state.

[152] Art. 137, Code of French Nationality.

[153] Arts. 149–151, Nationality Code.

[154] See Lenoan, Note to Époux Landauer c. Corniglion-Molinier, Cour de Cassation (Ch. Civ., Sect. Civ.), April 26, 1950, [1950] Dalloz Jurisprudence 361.

[155] 215 F 2d 547, at 553 (1954).

was made. Frequently, after proceedings in which a foreign nationality status is in issue have been initiated, the person concerned will secure a determination from the otherwise competent authority of the country whose nationality is involved and offer it in evidence. Such determination should be viewed with skepticism. Indeed, it is arguable that once jurisdiction over the foreign nationality issue has been assumed in one country, that of the foreign authority is, for the purpose of the proceedings at bar, ousted.[156, 157]

While, in ordinary cases, it may be argued that an individual should not be penalized for a position taken by his government with regard to persons with whom he has no connection, that argument is not equally persuasive where—as in the case of nationality—the issue is one closely attached to sovereignty. This raises the problem of the role to be assigned to comity in deciding whether recognition should be given to foreign judgments on nationality. A German author, for instance, has taken the position that "[j]udgments rendered in a foreign country in matters of public law" —and the nationality issue is undoubtedly regarded as such matter in Germany—"cannot be *res judicata* in another country."[158] Should such rule be adopted by a foreign country with regard to local judgments in nationality matters, this might very well be taken into consideration in deciding upon the effect to be given to that country's nationality judgments.[159]

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[156] As stated in United Cigarette Mach. Co. Limited, v. Wright, 156 F 244 (Cir. Ct. ,E. D. North Carolina, 1907), affd., 193 F 1023 (C. C. A. 4th, N. C., 1912), at 246: "No court allows another court to take possession of a controversy of which the first court has assumed full jurisdiction." See also Royal Mail Steam Packet Co. v. Companhia de Navegação Lloyd Brasileiro, 27 F 2d 1002 (D. C. E. D., New York, 1928); Rothschild v. Naamlooze Vennootschap Geb. P. T., 194 Misc. 479, 87 N. Y. S. 2d 189 (Sup. Ct., Spec. Term, New York County, 1949).

[157] Nor is there justification for deviating from ordinary reasonable rules of evidence in evaluating the probative force of other than judicial pronouncements issuing from competent authorities of a foreign country. Thus, where a certificate of a foreign office is "no more than a narrative of a past event, and as such . . . mere hearsay," it is proper to exclude it. Van Zedtwitz v. Sutherland, 26 F 2d 525 (App. D. C., 1928). In support of his contention that he had expatriated himself from Germany, appellant offered in evidence a certificate, dated June 11, 1923, attested by certain officers of the German Foreign Office, to the effect that he had forfeited his German citizenship prior to January 1, 1914, by reason of his continuous absence from Germany for more than ten years. The rejection of this evidence was upheld.

Passports are generally held not to be conclusive evidence of nationality. See, e.g., Medvedieff v. Cities Service Oil Co., 35 F. Supp. 999 (D. C. S. D., New York, 1940). For holdings in other countries see Diplock, "Passports and Protection in International Law," 32 The Grotius Society (1946) 42.

[158] Neumayer, 4 Internationales Verwaltungsrecht (1936) 313.

[159] Of course, argument contrary to that suggested in the text might be also made on the basis of the close connection between nationality and sovereignty.

Of course, the presence or absence of a foreign nationality may be decided without the aid or even in disregard of a determination of the nationality status by authorities of the country whose nationality is involved. Such decision requires a finding that the constituent elements of that nationality, as defined by the pertinent foreign law, are present or absent. A critical appraisal of the rules which govern evidence and proof in such cases would exceed the scope of the present paper. One observation, however, may serve as illustration of the need for re-examination of these rules in certain types of cases. There can hardly be any doubt that expatriation, although technically not a punitive device, often has the same effect as a punishment. Such expatriation may be predicated upon acquisition of a foreign nationality. The question whether a foreign nationality has been acquired may depend on interpretation of rules of foreign law, on which even the authorities in the country of enactment widely disagree. Should courts in other countries be expected to determine the meaning of such rules? It is believed that, in such instances, a decision rendered by the Swiss Federal Tribunal may serve as a guide. That court held[160] that where the loss of Swiss citizenship was predicated upon acquisition of a foreign citizenship under a foreign law which was obscure and highly controversial,[161] the petitioner could not be denied

[160] S. R. g. Eidg. Justiz- und Polizeidepartment, Schweizerisches Bundesgericht, May 26, 1950 (BGE 76 I 172).

[161] In June 1944, T, a natural-born Swiss citizen of Protestant faith, married R, a Polish citizen of Jewish faith. The Polish law then in force (Law of March 16, 1836, discussed *infra*) prohibited marriages between Polish citizens of Jewish faith who had never resided in Poland and Protestants. Under Swiss law (art. 7(c) of the Federal Law of June 25, 1891, concerning the Civil Status of Settlers and Sojourners, cited *supra*, note 29, and art. 1 of the Hague Convention of June 12, 1902), the validity of marriage is determined by the *lex patriae* of each fiancé. However, the competent authority at the place of celebration may permit the marriage to be celebrated if a marriage prohibition imposed by a foreign country is based solely on religious grounds, although the country imposing the prohibition need not recognize such marriage as valid. In view of the last mentioned clause, recognizing Poland's right to refuse giving effect to the marriage, the Swiss authority made a notation in the Register of Civil Status that T preserved her Swiss citizenship in spite of her marriage to R, as the Swiss nationality law in force in 1944 provided that a female citizen preserves her citizenship notwithstanding marriage to an alien if she would otherwise inevitably become stateless (compare *supra*, note 36). The Federal Justice and Police Department, having found that T had acquired Polish citizenship by her marriage, held that she had lost her Swiss citizenship. It based this finding on the legal opinions of the Polish Legation in Berne and of authorities of the City of Warsaw to the effect that, under the pertinent Polish law, a marriage concluded in contravention to the law was not void but merely voidable and that, since the Law of September 25, 1945, such marriage could no longer be declared void in Poland. The Federal Tribunal reversed the decision of the Department. It took into consideration the fact that petitioner applied for and was refused Polish citizenship. It held that, while such refusal, if erroneous, would not necessarily bind Swiss authorities, it showed that there was no agreement among Polish authorities on the effect of the Polish law in issue. How, then, could a Swiss court be expected to resolve the question?

her native Swiss citizenship.[162] The decision thus disregarded the foreign law, on the ground that, in spite of abundant expert advice, the court was unable to resolve the intricate foreign law issue involved in the case.

[162] It may be interesting to note the nature of the Polish law which the Federal Tribunal was expected to interpret. It was the Law of March 16, 1836, concerning Marriage, a law of the former Polish Kingdom, issued in the form of a Decree of the Tsar. The approval of the law was communicated by the Russian State Secretary to the Governor of the Polish Kingdom on March 18/30, 1836. The law was promulgated June 24, 1836 (Dz. Praw Tom XVIII, str. 57–297). It was essentially a Russian law imposed on Poland. Konic, Prawo Małżeńskie Obowiazujace w b. Królewstwie Kongresowem (1924) 48 *et seq.* It followed the Russian pattern of marriage legislation, which treated the marriages of each religious denomination distinctively, in accordance with the ecclesiastical laws of the respective religions. Determination of its effect in Poland in 1944 required a combined knowledge of Russian Tsarist law and of Polish law.

SAMUEL KUCHEROV

The Legal Profession In Pre- and Post-Revolutionary Russia

I. THE LEGAL PROFESSION BEFORE THE BOLSHEVIST REVOLUTION

THE RUSSIAN LEGAL SYSTEM of the last decades preceding the October Revolution was based on the Judicial Reform of Alexander II proclaimed on November 20, 1864. Previously, the administration of justice retained all the main features created by the reforms of Peter the Great and Catherine II: extravagant complexity of courts, secret and inquisitorial procedure based on the doctrine of formal evidence, complete dependence of the judiciary upon the executive, etc.[1] The Judicial Reform of November 20, 1864, produced an almost miraculous change for the better in the administration of justice in Russia and put it on a modern and democratic basis. The complex court system was greatly simplified. Judicial power was separated from the legislative and executive powers to a very great extent, judges became irremovable, appointed for life;[2] the inquisitorial procedure was abolished, together with the doctrine of formal evidence and replaced by publicity in courts and controversial and accusatory principles in civil and criminal procedures. The Reform introduced three institutions which were a complete innovation for Russia: justices of the peace, jury (in important criminal cases), and the bar.

Two West-European Systems of Organization of the Legal Profession

The legislators of 1864 had to consult foreign patterns for the creation of the new institution, the bar. Two different systems of representation function in Western Europe: one is used in England, France, and Belgium, the other in Germany and Austria.

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[1] For details on the administration of justice before the October Revolution see the author's Courts, Lawyers and Trials Under the Last Three Tsars (New York, Frederick A. Praeger, 1953).

[2] Candidates for appointment were nominated for office by the general assembly of the court in which they had to serve.

According to the first system, representation is divided between the solicitor and the barrister, as is the case in England, or between the *avoué* and *avocat* as in France and Belgium. The duty of the first type of jurists (solicitors and *avoués*) is to prepare the civil cases. The second type of jurists (barristers and *avocats*) represent their clients in civil cases or defend the accused in court in criminal cases. The *avoué* is an official of the Ministry of Justice, although he is remunerated by his client. The French and Belgian young lawyer—*avocat stagiaire*—takes the oath in the beginning of the probation period and is from this moment on in the possession of almost all the rights of *maître*, and also has this title. The robe he wears in court differs only slightly—in the shape of the collar—from that of an *avocat*. If he has reached the age of twenty-two, he has the right to carry on suits in his own name, pleading in court on an equal footing with his senior colleagues.

According to the second system, the German *Rechtsanwalt* assumes both functions of preparing and pleading the case in court. However, the *Rechtsanwalt* is closer to the *avoué* than to the *avocat*. Until 1878, the *Rechtsanwalt* was in the service of the Ministry of Justice, and only after the regulations of 1878 did the activity of the *Rechtsanwalt* become a free profession. Nevertheless, he has remained in a semi-official position; his participation is required in all important civil and criminal cases. His fees are strictly regulated, and he has no right to charge more or accept less than prescribed by law.[3] Before admission to the bar, a candidate for the position of a *Rechtsanwalt* has to have three years of training in various courts; during this period of probation, he holds an unremunerated position as an official of the Ministry of Justice, with the title of *Referendar*.

The Russian Bar

The Reform of 1864 rejected both the dualism of the English-French system and the semi-official position of the German lawyer. The Russian lawyer handled the case from the beginning to the end, and he was not bureaucratically influenced by his training and position.

The Judicial Reform of 1864 created a guild of lawyers consisting of local bars. All the lawyers were attached to the court of appeal of their residence, and formed the bar. When the number of registered lawyers reached twenty, they could request the permission of the court of appeal to call a general assembly of the bar for the election of a council of the bar (for one year) and a president and an assistant president of the

[3] *Pacta de quota litis* are prohibited.

council.[4] The rights and duties of the council, which had an administrative and disciplinary character, were established by the Laws of 1864. The council considered applications for admission to the bar and notified the court of appeal of its decision. If the decision of the council was favorable, the court entered the applicant in the list of lawyers attached to it.

The council examined also complaints against lawyers and supervised the strict observance of regulations, existing rules of behavior, and the fulfillment by lawyers of their professional obligations to clients. It had also to appoint lawyers to serve as counsel for indigent persons and to designate counsel for those who so requested. In cities where councils were not yet introduced, the functions of the council devolved upon the local circuit court. Thus, the guild of lawyers enjoyed the right of complete self-administration, while the executive power was completely excluded from the right of guiding or supervising the activity of lawyers and their institutions.

Persons who sought to apply for admission to the bar had to have higher legal education, complete the five-year period of probation as lawyers-in-training, and meet a number of requirements concerning age (25 years) citizenship, court decisions, etc. Persons in government service or elected officials, with the exception of those occupying honorary positions without remuneration, were excluded from admission. Also, women were not admitted to the legal profession, although their admission to the bar was not forbidden by law. In 1910, the Senate (the Russian Supreme Court) ruled that "women . . . have no right to be admitted to the bar and to be appointed to the position of a lawyer or lawyer-in-training."[5]

A lawyer was prohibited: (1) to acquire claims of their clients in litigation, either under their proper name or under the disguise of acquiring them for other persons; all such transactions were declared void, and lawyers made to answer before the council of the bar, (2) to sue their parents, children, brothers, sisters, uncles, and cousins, (3) to serve as counsel for both parties and to go over to the opposite party during a suit, (4) to divulge secrets of their clients, not only during the lawsuit, but also in case of dismissal by the client, or even after the termination of the lawsuit.[6]

The lawyer was held responsible if he allowed a legal deadline to lapse or did not observe other prescribed forms or rules. In such a case, the client had the right to sue him for damages.[7] For premeditated conduct

[4] Uchrezhdeniye sudebnykh ustanovlenii, Articles 357, 358.
[5] Zhurnal ministerstva justitsii, Sept. 1912, p. 242.
[6] Uchrezhdeniye sudebnykh ustanovlenii, Articles 400–403.
[7] *Ibid.*, Art. 404.

detrimental to his client, a lawyer was not only liable for the damage inflicted but was also responsible to a criminal court in case his client complained.[8]

Lawyers-in-Training

Article 354 of the Statutes of Judicial Institutions established a five-year period of training for young lawyers upon graduation from a faculty of law of a university or law school. The provision required that a young lawyer "practice law during five years under the guidance of a lawyer in the capacity of his assistant." On the system of training, however, which the young lawyer had to undergo during the probation period, the law was silent. Since there were no provisions of law with regard to the methods of training of young lawyers, regulations to that effect had to be issued by councils of the bar. As a result, every council of the bar established its own rules concerning lawyers-in-training in its district. However, the basic features of training were similar in all districts. The system of training of young lawyers was that of apprenticeship. According to it the young lawyer was an assistant of his patron, a clerk in his office. He had to pass his five years of probation working under the personal direction and supervision of his patron, who had to instruct him in the finesses of the legal profession. Upon completion of the five-year training period, the young lawyer could apply for admission to the bar as a senior member.

Disciplinary Power of the Council of the Bar

The disciplinary power of the council of the bar extended to lawyers and lawyers-in-training and covered all irregular actions committed by them. The council acted as a court of first instance. As second instance, the plenary assembly of the appellate court functioned. The lawyer involved had a right of appeal. Also, the district attorney, who had to be notified of every disciplinary proceeding, could lodge a protest with the appellate court, if he considered the punishment inflicted by the council as insufficient. A further appeal to the Senate was permitted.

The disciplinary competence of the council extended beyond the limits of the professional activity of lawyers and their trainees. In 1872, the Council of the St. Petersburg Bar decided that "the only sphere which does not and will not concern the Council is the private family life of the lawyer."[9] How strict the councils were in matters of transgression of their duties by lawyers and lawyers-in-training may be seen from the fact that the St. Petersburg and Kharkov Councils ruled that there is no

[8] *Ibid.*, Art. 405.

[9] Istoriya russkoi advokatury 1864–1914 (Moskva, 1914–16) II, 312.

period of limitation for displinary proceedings, that these proceedings, when started, are not to be discontinued because of a private settlement between the lawyer and the complainant, and that the disciplinary power of councils extends to actions committed by the lawyer before his admission to the bar.

Strict rules of professional behavior and ethics were worked out and maintained by the councils in their decisions, published in their yearly reports. They provide a persuasive testimony of the high standards of morals and ethics required by the councils of members of the bar.

For the sake of comparison of ethical concepts of former Russian and present Soviet lawyers we shall discuss here two problems of professional ethics: the right of the counsel to leave the defense during the trial and the counsel's duty not to reveal secrets entrusted to him by his client.

Dropping the Defense

In his summing-up, the counsel, L. A. Kupernik, said:

> I consider the testimony of the accused here in court as false, invented in jail, and, especially, contrary to the only expression of human feelings which he gave earlier. If the law permits the prosecutor to drop the accusation according to his conscience, I consider that I have the right and the duty to renounce the defense . . . Since the criminal responsibility of the accused had been proved, and since a certain system of punishment exists, I can only say: let justice run its course.[10]

The Moscow Council was of the opinion that Kupernik's behavior was improper and reprimanded him. K. Arsen'yev, an eminent lawyer and President of the St. Petersburg Council of the Bar, thought that such leniency on the part of the Moscow Council was incomprehensible and that the St. Petersburg Council would have taken a much more rigorous position.[11]

It is evident that Kupernik committed an offense against the basic duties of a lawyer. There is always something to say to mitigate the guilt of the worst criminal. As Koni observes: "There is no criminal or fallen person in whom everything human is irrevocably darkened and about whom it is quite useless to hear a word of indulgence."[12]

Obligation of Secrecy

Article 704 of the old Code of Criminal Procedure prescribed that "lawyers and other persons who fulfill the duties of counsel to the ac-

[10] Sudebnyi vestnik, 1874, No. 202.

[11] K. K. Arsen'yev, Zametki o russkoi advokature (Sankt-Peterburg, 1875) footnote on p. 148.

[12] A. F. Koni. Na zhiznennon puti (Moscow, 1913) II, 517.

cused are not permitted to testify about confessions made to them by their clients during the proceedings in which they are involved." With regard to the duty of the lawyer not to reveal the secrets of his client, the Moscow Council of the Bar declared that "the secrets entrusted to the lawyer are sacred; never, to anybody, and under no conditions should they be revealed by him, even if he is invited to do so by the court itself."[13] The Senate confirmed the lawyer's duty of secrecy in the following remarkable words: "The dignity of criminal procedure is determined mainly by the nature of the means which the law allows or does not allow to be used for reaching the principal goal, *i.e.*, the discovery of the real perpetrator of any crime or misdemeanor. It would be incompatible with the dignity of the administration of justice to make use, for this purpose, of sources which are clearly unreliable or dangerous for public morals. One such source undoubtedly is . . . testimony against the accused combined with the disclosure of secrets."[14]

Thus, both the Senate and the Council were firm in their opinion that the lawyer had no right to reveal no matter to whom, under any circumstances, without any exceptions, what his client had told him.

The Russian Lawyer as Defender of the Individual

The Judicial Reform of 1864, like all the great reforms of Alexander II, was the product of the mighty wave of individualism which reached its peak in Europe about the middle of the 19th century. The emancipation of the individual by the Reform of 1864 is remarkably defined by Prof. Foinitsky:

> Something new in the understanding of legality itself must have been brought about by the Laws of November 20, 1864, if these Laws had the power to change our life to such an extent that the historian finds a greater and deeper difference between 1900 and 1860 than between 1860 and the time of Catherine II and even Peter the Great. Such was the influence achieved by the new spirit which entered Russian life in the sixties. This new spirit, which was characteristic of the codes and which, like the Emancipation Law of 1861, was created by a wave of liberating thought, consisted in the *idea of the individual*. This idea not only gave a definite form to the principle of legality itself, which was greatly different from the conception of legality as it was understood by previous codes, but also insured its wide and steady spreading in our fatherland.[15]

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[13] Otchet Soveta prisyazhnykh poverennykh pri Moskovskoi Sudebnoi Palate za 1899/1900' p. 141.

[14] Decision of the Criminal Department of Cassation of the Senate, 1894, No. 2 (in the Popov Case).

[15] I. Ya. Foinitsky, "The Doctrine of the Individual in the Judicial Statutes of November 20, 1864, and Their Codificational Importance," Pravo (1899) 2283.

Indeed, in the field of administration of justice, absolutism was abolished in Russia in 1864; the individual was endowed with well-established rights in court as against the government, and he had at his side the lawyer, put there by the Reform, to defend him. The French historian Leroy-Beaulieu, who visited Russia in the seventies, wrote:

> Every Russian who has been brought to court has seen a man rise by his side who has dared to oppose, in his name, the representative of authority over the charge brought against him. In this vast Empire, which has no political assemblies, the honor of having been the first to speak up freely belongs to the lawyers. In a country where military courage is quite common, the lawyers were the first to be called upon to give an example of something hitherto unknown: civic courage.[16]

But the lawyers were not only the *first* ones to raise their voices in free speech; they were, for a long time, the *only* ones permitted to do so in Russia.

Certainly, the Reform of 1864 did not convert Russia into a democratic state. The executive and the legislative powers remained autocratic, and the individual had to continue his struggle for political rights and liberty. The lawyer assisted him in this struggle. "The fight for the rights of the individual, his defense against the unmitigated rule of the state—this is the field of action of a free lawyer," M. M. Winaver wrote.[17]

The same was asserted by another eminent Russian lawyer, O. O. Gruzenberg, who in his speech in the General Assembly of the St. Petersburg Bar on the occasion of the jubilee marking its fiftieth anniversary (1866–1916[18]), said:

> Does our guild understand that where the state puts pressure with its entire unlimited might, with all its inexhaustible resources, on a grain of sand—on the individual—there, first of all, is the lawyer's place? It is there that must be employed the greatest virtues of a counsel: fearlessness, readiness to take the blows directed against the accused, and the ability not to fear loneliness in the court hall. . . . Hundreds of cases involving peasants, workers, pogroms, thousands of purely political cases have been pleaded by steadfast and courageous counsels. With the greatest efforts, often forgetting their own interests, our colleagues in all corners of Russia have fulfilled their modest but great office—*the office of the defense of the individual against the onslaught of the state.*[19]

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[16] A. Leroy-Beaulieu, L'Empire des tsars et les Russes (Paris, 1881–1889) II, 364.
[17] M. M. Winaver, Nedavneye (Paris 1926) 56.
[18] The new courts and the bar started their activities in St. Petersburg on April 17, 1866.
[19] O. O. Gruzenberg, Ocherki i rechi (New York, 1944) 82, 89.

And O. Ya. Pergament, also a distinguished counsel, characterized the activity of the Russian lawyer before the Revolution as follows:

> Was there during this last decade, a single so-called public case caused by a strike, or by religious sectarianism, or by mass movements due to class, economic or religious motives, or by political crimes, in which representatives of the Russian guild of lawyers did not take part—disinterestedly, valiantly and bravely? In spite of the hard work, time, and responsibility involved, not sparing their strength and expenses [lawyers] raised their voice . . . awakening the public by their appeal from its somnolence and Philistinism. Public consciousness was awakened to a great extent by the voice of the lawyer which rolled over the entire country. Created in the public interest, the guild of lawyers really served the public's welfare.[20]

The role of the lawyer was rendered still more important due to the fact that on the same day of November 20, 1864, on which the Reform was promulgated, the Tsar signed an ukaz according to which the verbatim reports of the trials were permitted to appear in the press uncurtailed by censorship, thus making the free words of the lawyers heard throughout the country.

Thanks to this law, which remained in force until the end of the tsarist regime, the voice of the lawyer was heard in the remotest parts of the vast empire. During the 50 years of the existence of the Reform, the lawyer retained the right of free speech in court almost completely. Let us illustrate this freedom of speech by the final passage of N. P. Karabchevsky's summing-up in the Sazonov Case. On July 15, 1904, V. K Pleve, Minister of the Interior, head of the reaction and the most hated man in Russia, was blown to pieces by a bomb thrown into his carriage by a social-revolutionary, Yegor Sazonov. Describing Sazonov's train of thought, Karabchevsky, one of the foremost trial lawyers in Russia, said:

> . . . All the horror which overtook Russia in the last years was attributed to Pleve. It was he who insisted on the hanging of Balmashev,[21] he jailed and banished thousands of innocent people, he flogged and shot peasants and workers, he scoffed at the intelligentsia, he instigated mass massacres of Jews in Kishenev and Gomel, he choked Finland, he oppressed the Poles, he exercised his influence to bring about the war with Japan in which so much blood has already been shed and will continue to be shed in the future . . . Sazonov's imagination pictured Pleve as a fatal, sinister, nightmarish figure, pressing his

[20] O. Ya. Pergament, Obschchestvennyya zadachi advokatury (Odessa, 1905) 29–30.

[21] S. V. Balmashev was the student who assassinated Minister Sipyagin on April 2, 1902. and was tried by the St. Petersburg Circuit Court-Martial and sentenced to capital punishment by hanging.

imperious knee against the chest of the fatherland and mercilessly choking it. It seemed to Sazonov that this monster could be annihilated only by another monster—death. And grasping with trembling hands the bomb which was destined for Pleve, Sazonov believed, piously believed, that it was filled not so much with dynamite and fulminate of mercury as with the tears, sorrow, and calamity of the people. And when its splinters burst and scattered in all directions, it seemed to him that he heard how the chains which bind the Russian people are jangling and breaking to pieces . . . So thought Sazonov . . . That is why when he regained consciousness, he shouted: "Long live liberty!"[22]

It must be emphasized that the guild of lawyers as such, never pursued political interests. In the majority of cases, individual lawyers pleaded in political trials, not because they shared the political convictions of the accused, but because they considered it to be their task to defend the individual against the state regardless of the crime committed. The lawyer had to produce everything which could be used in defense of his client. The political opinions of Karabchevsky, for instance, had nothing in common with those of Sazonov. But Karabchevsky, in order to defend Sazonov, had to explain the crime from Sazonov's point of view. That is why Karabchevsky's speech sounds as revolutionary as the political convictions of Sazonov. Karabchevsky's picture of Pleve as he appeared to Sazonov is so vivid that, when reading the speech, it becomes clear that Sazonov *had* to throw the bomb which tore Pleve to pieces, that *he* could not act differently, that in *his* eyes this was a just retaliation for all the evils which this minister had inflicted upon the Russian people.

But the political trials were only one of the lawyer's spheres of activity. The regular criminal and civil proceedings were other fields for his daily fight for the individual. In criminal proceedings, the lawyer was able to denounce the economic and social injustices which often bring a man into the dock. Here again he defended the individual against the punitive power of the state. In civil proceedings he defended the material interests of his client. Foinitsky said: "Coming to the help of the oppressed and often of the innocent man in the most critical period of his life, the defense is one of the noblest fields of juridical activity. It is capable of stimulating all the best spiritual forces of man. That is the explanation why persons of high intellectual and moral caliber dedicate themselves to this profession, and of the undeniable sympathy of the public toward the pure essence of this activity."[23]

It is a historical phenomenon that noble aims always find people ready

[22] N. P. Karabchevsky, Delo Sazonova (S.-Peterburg, 1906) 27.

[23] I. Ya. Foinitsky, Zashchita v ugolovnom protesse kak sluzheniye obshchestvennoye (Sankt-Peterburg, 1885) 62.

to dedicate their lives to them. When the Reform of 1864 opened up administration of justice as a real public service, the Russian intelligentsia rushed into this field of activity. Judges, prosecutors, lawyers—all were inflamed by the new spirit created by the great Reform of Alexander II. As Koni says on this subject: "It was an activity . . . like a calling, like a *first love*. Such a love exists not only in the personal life of a man, but also in his public life. In both cases, it is the *first* thing to enter his heart and the *last* thing to leave his memory."[24]

It is a striking phenomenon that this love was revived over and over again in the hearts of subsequent generations. An imposing number of very prominent orators, jurists, and scholars adorned the ranks of the Russian bar in the short period of its existence. Enthusiasm for their profession, idealism, devotion to the freedom of the individual and its defense, which took possession of the lawyers at the beginning of their activity, lasted for the fifty years during which the guild existed in Russia.

The existing judicial institutions, including the guild of lawyers, were abrogated by Decree No. 1 on Courts of the RSFSR Council of People's Commissars of November 24, 1917.[25] It is one of the supreme ironies of history that the free Russian lawyer and the democratic administration of justice were born by the will of an autocratic Tsar and destroyed, as the life of this Tsar itself, by revolutionaries. The abrogated organizations attempted to fight Decree No. 1. A decision of the Senate prohibited the application of the Decree to judicial institutions. On November 26, 1917, the General Assembly of the Petrograd Bar decided that Decree No. 1 cannot be recognized as a law, since it was issued by an incompetent agency. The Assembly directed the members of the bar to continue their previous activity in the old law courts.[26] The Moscow Bar concurred with the decisions of the Senate and the Petrograd Bar on December 3, 1917.[27] Similar decisions were taken by assemblies of judges and lawyers in other cities.[28] This fight was hopeless. The liquidation of all judicial organs was carried out in Petrograd by the representative of the investigation commission of the Military-Revolutionary Committee on November 29, 1917. The activity of the Moscow judicial institutions was stopped with the help of armed Red Guards some weeks later. Such was the end of the Reform of 1864 and its institutions.

The abrogation of the guild of lawyers had its precedent in history.

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[24] A. F. Koni, Za posledniye gody (Sankt-Peterburg, 1898) 483.

[25] Sobraniye uzakonenii RSFSR 1917–1918, No. 4, Item 50.

[26] Russkiye Vedomosti, Nov. 27, 1917.

[27] *Ibid.*, Dec. 5, 1917.

[28] For instance, in Smolensk. See Smolenskiye Vedomosti, Dec. 30, 1917.

The French *Constituante* declared in its Decrees of August 16 and September 2, 1890, that those who "call themselves *avocats* may no longer form a class, or association, or wear special clothes during the performance of their duties . . . everyone will have the right to carry on his suit personally if he finds it convenient. . . ."[29]

In the *Constituante*, a single man raised his voice against the abrogation of the lawyers' guild. It was Robespierre. He pronounced words which may be applied to the pre-Revolutionary lawyer in Russia as well. This profession alone, said Robespierre,

> . . . escaped the absolute power of the monarch. I admit that this profession was not free either of the abuses which will always afflict people who do not live under a régime of freedom; but I am obliged to recognize . . . that this organization contained the last vestige of liberty, which had been banished from other parts of society. This association alone retained the courage to speak the truth, dared to maintain the rights of the weak victim against his mighty oppressor. You will no longer see, in the sanctuary of justice, these men who were receptive and capable of becoming inflamed by their interest for other people . . . These men, fearless and eloquent, the defenders of innocence and the terror of crime . . . will retreat, and you will see in their place coarse lawyers, indifferent to their duties and prompted to their noble activity by base calculation. You are perverting and abusing an activity valuable to humanity, necessary for the spiritual development of society. You are closing the school of civic virtues, where talent and valor have learned to defend the interests of citizens in courts.[30]

Gaudry and Le Berquier called these words prophetic.

II. LEGAL PROFESSION UNDER THE SOVIET RÉGIME

Historical Development

Decree No. 1 of November 24, 1917, created a situation in the legal profession which was unprecedented in history. Indeed, the Decree provided that all unstained citizens of both sexes, holders of civic rights, may act as prosecutors and counsels for defense.[31] As a consequence of this freedom for everyone to exercise the legal profession, some former lawyers, whose organization was liquidated by the same Decree, continued to act as counsel.

On February 22, 1918, Decree No. 2 on Courts[32] was promulgated. In its draft the right for every citizen of good behavior to act in court as a

[29] Joachim Gaudry, Histoire du barreau de Paris depuis son origine jusqu'à 1830 (Paris, 1864) II, 336.

[30] Jules Le Berquier, Le barreau moderne (Paris, 1869) 26–27.

[31] Sobraniye uzakonenii RSFSR, 1917–1918, No. 4, Item 50.

[32] *Ibid.*, No. 26, Item 420.

prosecutor or counsel was retained. Art. 24 of the draft reads as follows: "Every citizen of either sex, in possession of political rights and chosen by the parties, may participate in the proceedings in the capacity of prosecutor or counsel." However, Lenin changed Article 24 of the draft and formulated it as follows: "Colleges of persons who dedicate themselves to the defense of rights in the capacity of public prosecutors or public defenders are created and attached to Councils of Workers', Soldiers', and Peasants' Deputies. Only these persons have the right to act in court for remuneration."[33] The emphasis here is on "remuneration." Among the persons present at the trial, one person was permitted to speak for the defense and another for the prosecution (besides the remunerated members of colleges), provided they were not paid.

The organization created by Decree No. 2 was not lasting. It was considered undesirable to unite the prosecution and the defense in one college. First, the separation took place in military courts; the Decree of May 4, 1918, organized the prosecutors in special colleges attached to military tribunals. In other courts, the prosecution and the defense remained for a while united.

The local Soviets assumed the duty of regulating the activities of the colleges. Thus, for instance, the Moscow Soviet issued a regulation "On the College of the Defenders of Rights" of Sept. 3, 1918, in which it assumed the duty to appoint new members of the college and dismiss old ones. Councils of the colleges were created. Their duty consisted in controlling the activity of the colleges, in the working out of regulations and instructions concerning the activity of college members, the establishment of a schedule of fees, the appointment of prosecutors and counsels for pleading in courts, etc. The remuneration of a counsel who was a member of a college was provided by the client to the counsel himself, who had to forward it to the college fund for distribution among all members.[34]

The Statutes on the People's Courts of Nov. 30, 1918,[35] introduced a new form of organization of the legal profession. Colleges of counsel, prosecutors, and representatives of parties in civil procedure were reorganized and attached to District and Province Executive Committees. Members of such colleges were officials, remunerated by wages corresponding to those of people's judges. They had no right to accept fees from their clients. The exceptional position of prosecutors in military tribunals, established by the Decree of May 4, 1918, was abrogated, and members of colleges became prosecutors and counsel in military courts as well.

[33] Lenin, Sochineniya (2d ed., Moskva, 1926–1932) XXI, 218.
[34] Izvestia, 1918, No. 189.
[35] Sob. uzak. RSFSR, 1917–1918, No. 85, Item 889.

However, the institution of counsel as special officials was soon considered inefficient. It was therefore liquidated and a new organization adopted by the Statutes on People's Courts of Oct. 21, 1920.[36] Prosecutors were separated from colleges and attached to the militia. With regard to counsel, the Decree established provisions unique in the history of the legal profession throughout the world: all persons "capable to act as counsel for the defense" in court were drafted as such and entered in lists prepared by people's judges, councils of people's judges, professional and party organizations, and Departments of Justice.[36a] District Executive Committees had to confirm these lists twice a year on the first of January and of July. The inclusion of a person in the list was tantamount to a draft; such a person was obliged to serve as a counsel whether he wanted to or not. The duty of distributing the draftees among various courts and tribunals was transferred to the Departments of Justice. Whenever necessary, the courts or tribunals summoned the persons entered on the lists for the performance of duties as counsel. If the number of draftees was insufficient, the court had the right to appoint defense counsel from among consultants to the Departments of Justice.

It is evident that such a system was doomed to failure. The draftees were reluctant to perform duties pressed upon them, and in many instances those who showed up for duty were unable to fulfil it, being unprepared for the legal profession. That is why actually the majority of counsel for the defense were appointed from among consultants to the Departments of Justice. In this way they remained officials, just as they were between 1918 and 1920.

Making lawyers into officials was part of the general bureaucratization which the Soviet State introduced in the period of War Communism.

With the advent of the New Economic Policy (NEP), changes in the administration of justice and, naturally, in the structure of the legal profession, were inevitable. The All-Russian Central Executive Committee (VTsIK) adopted the Statutes of the Legal Profession on May 25, 1922, even previous to the Statutes on Court Structure on November 3, 1922. According to these Statutes, colleges of counsel were formed and attached to *guberniya* (later to *krai* and *oblast'*) courts—not to Soviets or their Executive Committees, as before. Certain rights of self-administration were granted to the colleges. Their members elected a presidium, which had to control the activities of the college and of its members. The

[36] *Ibid.*, 1920, No. 83, Item 407.

[36a] Departments of Justice were created at local Soviets by the Decree of Jan. 30, 1919 and reorganized by Statutes on Local Organs of Justice of Aug. 21, 1920. They were local organs of the People's Commissariat of Justice and at the same time were subordinate to corresponding Soviets of Workers', Soldiers' and Peasants' Deputies.

presidium admitted new members to the college and carried out disciplinary supervision over its members. But *Guberniya*, *Krai* and *Oblast'* Executive Committees retained the right to revoke the appointment of any member of the college. The Presidium of these Executive Committees functioned also as an appellate instance for complaints against decisions of college presidiums in disciplinary procedure. Thus, although attached to courts, the colleges depended upon Executive Committees, i.e., upon the administration. A certain change in the situation was effected two years later, in 1924, when appeal against the decisions of college presidiums was excluded from the jurisdiction of the Executive Committees and transferred to the competence of *guberniya*, *krai*, and *oblast'* courts. The right to remove members of colleges remained, however, with the Executive Committees.

During the NEP, or, more exactly, between 1922 and 1930, private law practice was permitted. Fees were regulated by the state. The college presidiums established public legal consultation offices in cities and rural areas. In these offices, members of colleges had to render legal assistance to the population free of charge, as a public service. Then, in 1930, without any special legislation, another major change occurred in the structure of the legal profession. After the liquidation of the NEP, a new policy—the drive for collectivization and industrialization—was started. Collectivization embraced not only the peasantry but the legal profession as well. Peasants were forced into collective farms; lawyers were compelled to join collectives of "defenders of rights" (counsel). Individual law practice was forbidden. Legal work was concentrated in collectives, labeled "voluntary" associations of lawyers. Every college had several such collectives.

On paper, collective farms too are "voluntary" co-operatives of peasants. In reality, just as the peasant had to join a collective farm, the lawyer had to become a member of a collective of counsels if he wanted to exercise the legal profession. The Soviet jurist, D. S. Karev, admits that in many instances "collectivization" was forced upon the lawyers, that the lawyers who did not join the collectives were virtually deprived of the possibility to plead in court, that the money of the collectives was often illegally diverted for needs of the organs of prosecution and the courts, etc.[37]

A client who needed the services of a counsel signed a contract with the collective, not with the individual counsel who was assigned to help him. Fees were paid to the collective and not to the lawyer. The members of

[37] D. S. Karev, Sudoustroistvo (Moskva, 1948) 290.

the collective were remunerated according to the quantity and quality of work performed. The schedule of remuneration differed in various collectives.

The Law of July 20, 1930, created a Department of Legal Defense within the People's Commissariat of Justice. Its duty was the general guidance of the lawyers' activity and their organization. Thus, control over the legal profession by the administration was further tightened.

The 1936 Constitution made necessary the reorganization of the administration of justice. Laws on the Court System, Aug. 16, 1938, and on the Statutes of Advocates, Aug. 16, 1939, effected this reorganization. The Statutes on Advocates of 1939[38] still regulate the activity of Soviet lawyers today.

The college system has been retained. Persons who are not members of colleges may be admitted to exercise the legal profession only by special permission of the People's Commissar (since 1946, Minister) of Justice of the appropriate Federal Republic.[39]

Who has the right to be a member of a college? (1) Persons with higher legal education (attendance in courses for four years). (2) Graduates of law schools (attendance in courses for two years) who have practiced law in the capacity of judges, prosecutors, investigating magistrates, or legal advisers for a probation period of not less than one year. (3) Persons without legal education but who have worked in the capacity of judges, prosecutors, investigating magistrates, or legal advisers for not less than three years.[40] Persons deprived of electoral rights, persons convicted in criminal court, and persons under criminal investigation or indictment are excluded from admission to colleges.[41]

A college member may be expelled for the following reasons: a crime established by the court, behavior detrimental to the position of a Soviet advocate, and violation of internal order regulations.[42] An appeal against the decision of the college presidium declining admission or ordering exclusion from membership can be made to the People's Commissar of Justice of the Federal or Autonomous Republic. The decision of the People's Commissar of an Autonomous Republic may be appealed to the People's Commissar of Justice of the Federal Republic and the decision of the latter—to the USSR People's Commissar of Justice, whose decision is final.[43]

[38] Sobraniye postanovlenii i rasporyazhenii pravitel'stva SSSR, 1939, No. 49, Item 394.
[39] *Ibid.*, Art. 5.
[40] *Ibid.*, Art. 6.
[41] *Ibid.*, Art. 8.
[42] *Ibid.*, Art. 10.
[43] *Ibid.*, Art. 11. The USSR Ministry of Justice has been abolished by the Decree of

According to the law,[44] the length of the probation period for persons with legal education but without legal experience had to be established by the USSR People's Commissar of Justice. In Article 3 of Instruction No. 47 of the USSR People's Commissariat of Justice of April 23, 1940, the probation period was fixed at one year.[45]

The same instructions which are dedicated to the problem of "preparation of young lawyers and trainees for independent work" prescribe that the young lawyers should be trained under the direction of experienced lawyers, who have to initiate them into the methods of practical legal work. During the time of probation, the trainees are paid wages. If after six months of probation the young lawyer proves unfit for legal work, he is excluded from the college by its presidium. On the other hand, if the results of the year of probation are satisfactory, the trainee becomes a full-fledged member of the college.

The organs of a college are the general assembly of all the members and the presidium elected by the general assembly. The presidium guides the work of the college, admits and excludes college members, assigns them to individual consultation units, etc.[46] It exercises disciplinary power over the members, i.e., examines complaints lodged against them and has the right to inflict the following punishments: slight reprimand, rebuke, strong rebuke, suspension from practice for up to six months, and exclusion from college membership.[47] The activity of college members is exercised in legal consultation offices organized by the presidium of the college in district centers and other cities of the *guberniya*, *krai*, or republic.

The client who needs legal help turns to the legal consultation office of his city or district. He cannot choose the lawyer whom he would like to entrust with his case but must deal with one of the members of the consultation office assigned to him by the chief of the office. The client may only express the desire to use the services of a particular lawyer; the final decision remains with the chief of the office.

The fees—at rates established by the USSR People's Comissariat of Justice—are paid to the consultation office. After a deduction of up to 30 per cent for expenses (remuneration of the college presidium, salary of

May 31, 1956. Thus, the final instance for appeal is now the Ministry of Justice of the particular Union Republic.

[44] *Ibid.*, Art. 7.

[45] Sovetskaya advokatura (Moskva, 1942) 22.

[46] *Ibid.*, p. 7.

[47] *Ibid.*, p. 9.

the clerical personnel, and the lawyers-in-training) the money is distributed among members of the legal consultation office.[48]

Before World War II, there were 127 colleges of advocates, 10,453 advocates and 478 lawyers-in-training, who were distributed among 1,461 legal consultation offices. As of January 1, 1947, the number of colleges increased to 150, the number of advocates to 13,134, and the number of legal consultation offices to 4,613. Women constituted 30 per cent of the college membership. Among the advocates, only 41.7 per cent had received higher legal education, 20 per cent were graduates of law schools.[49] The remaining 38.3 per cent had no legal education whatsoever.[50]

Comparisons

Let us now make some comparisons between lawyers in pre- and post-Revolutionary Russia.

A. Education and Training. We have seen that higher legal education was compulsory for lawyers in Russia between 1864 and 1917. At the present time in the USSR, legal education is not a prerequisite for exercise of the legal profession. Persons without legal education may be admitted to colleges of advocates, if they have worked in the capacity of a judge, prosecutor, investigating magistrate, or legal adviser for three years.[51]

Whereas in pre-Revolutionary Russia the young lawyer was trained for five years before he became a full-fledged lawyer, in the USSR the young lawyer is admitted as a member of the college of advocates after only one year of probation.

"Admission to the legal profession is too easy in the Soviet Union," writes M. Azimov. "This facility is not compatible with the responsibility placed on the advocate. It very often happens that a person dismissed after three or four years of work as a prosecutor or investigating magistrate because of unreliability is admitted to the legal profession without having any other qualifications for the responsible work of an advocate than a formal qualification, *i.e.* a certain juridical experience."[52] Such

[48] Order of the USSR People's Commissariat of Justice No. 85 of October 2, 1939, *Ibid.*, p. 11.

[49] Karev, *op. cit.*, p. 295.

[50] Professor E. L. Johnson of the University of Durham, who visited the Soviet Union in 1954 as a member of a British delegation of jurists, reports that the Moscow College consists of 1,014 advocates (among them 383 women) and that there are 24 legal consultation offices in Moscow with 30 to 60 advocates attached to each. See "Some aspects of the Soviet Legal System," Soviet Studies, (1955, Nov. 4) 352.

[51] Sovetskaya advokatura, p. 4.

[52] M. Azimov, "Soviet Lawyer," Sovetskaya yustitsiya (1941) No. 23, p. 15.

complaints about the deficient preparedness of advocates are frequent in the pages of the Soviet legal press. Thus T. Kruglov, reporting on the activity of Ukrainian advocates, considers that the unsatisfactory performance of their duties may be explained to a great extent by the fact that about one half of the advocates in the Ukraine have no higher legal education. And he gives examples: a certain Kel'in was admitted to the Voroshilovgrad College of Advocates in spite of the fact that he made 36 mistakes in spelling in 10 lines of his application; another case was that of Avdeyev, who was admitted to the Stalinsk College of Advocates after being dismissed from court work because of his incompetence.[53] A. Tager writes that one of the most serious and basic problems of the organization of colleges is their staff and especially the training of new members. "It is evident that in this respect the state of affairs in the colleges of advocates is unsatisfactory. . . . Soviet institutes of law, according to their teaching plans and aims, train personnel for the duties of judges, prosecutors, and investigating magistrates only. Providing fresh, young, well-trained personnel for colleges of advocates is not within the scope of these institutes."[54]

Complaints about the low educational level of advocates continued after the war. Thus, D. S. Karev wrote in 1948: "The presidiums of the colleges of advocates face the important problem of improving the qualifications of the advocates."[55] In a letter to the editor of the Literary Gazette, L. Lensky, Member of the Moscow College of Advocates, writes:

> Nobody except a graduate of a medical school may become a physician. But an advocate may be a person without any special education. It is time to rule that nobody has the right to join the legal profession without legal education.[56]

B. Ethics. Unethical behavior of advocates is a frequent subject of complaint in the pages of the Soviet press and in Soviet literature. The most numerous violations of law and discipline are the so called "mixed" cases. A "mixed" case is a case in which the advocate receives private remuneration from the client in addition to the fixed fee which the latter pays to the legal consultation office. There have been a few attempts to justify "mixed" cases by explaining the legal essence of the private remuneration as a tip which is voluntarily given by the client to the advocate in order to stimulate his work. But there is no doubt that the

[53] T. Kruglov, "Legal Help in the Ukraine," Sovetskaya yustitsiya (1941) No. 10, p. 14–15.
[54] A. Tager, "On Soviet Lawyers," Sotsialisticheskaya zakonnost' (1936) No. 10, p. 15.
[55] Karev, *op. cit.*, footnote 1 on p. 295.
[56] Literaturnaya gazeta, No. 61 of May 24, 1951, p. 2.

"mixed" cases are a flagrant violation of the law, which prescribes a fixed schedule for advocates' fees. The "mixed" practice was declared illegal by the Moscow People's Court in the Zemtsov and Ordynsky Case.[57] N. V. Krylenko, a famous prosecutor during the first period of Soviet rule, said about the "mixed" case:

> It cannot be uprooted under our conditions. To achieve this goal, it would be necessary to change human nature itself. Certainly one cannot uproot this kind of thing by any sort of prohibition or written papers.[58]

Krylenko was right. The "mixed" case will continue to exist, and "money will change hands"[59] illegally, as long as the legal profession remains "collectivized."

On September 17, 1950, Izvestia published an article by G. Ryklin under the title "Advokaty i ablakaty," translated by the *Current Digest of the Soviet Press* as "Lawyers and Shmoyers."[60] By "shmoyers" are to be understood the advocates who permit themselves illegal actions and exploit their clients in every respect. The author recommends that the colleges of advocates take energetic steps to get rid of "shmoyers" who continue to buzz around in legal consultation offices.

The question whether a counsel has the right to drop the defense during a criminal trial if he becomes convinced of the culpability of the accused, was raised as early as 1925 on the occasion of Counsel L's refusal to continue the defense.[61] In connection with this case, Yu. Elkin and Vl. Kaufman wrote an article in which they offered this question for public discussion. They argued as follows: since Art. 306 of the RSFSR Code of Criminal Procedure gives the prosecutor the right "to drop the accusation if he comes to the conclusion that evidence gathered during the trial does not justify the indictment," the counsel must have the right to drop the defense if he becomes convinced that the trial did not produce any weighty arguments in favor of the defense. The authors' conclusion is based on the interpretation of the position of the counsel in the Soviet court. The Soviet counsel, according to them, is an aid to the court who must assist the court in finding the right decision. The Soviet court, they argue, examines the complex intricacy of life from a class viewpoint and combines the law with the class consciousness of judges; the court de-

[57] Azimov, *op. cit.*, p. 13.

[58] Quoted by E. S. Rivlin, Sovetskaya advokatura (Moskva, 1926) 21.

[59] "Nothing prevented persons from making secret agreements with defense attorneys on the panel under which money changed hands." J. N. Hazard, "The Lawyer Under Socialism," Wisconsin Law Review (1946) No. 2, p. 94.

[60] CDSP, 1950, No. 38, p. 40.

[61] Izvestia, No. 77, Apr. 4, 1925.

mands every kind of help from its two aides: the prosecutor and the counsel. In the authors' opinion, the aim of the counsel is not the defense of the interests of the individual considered apart from the class interests of all workers and peasants. They maintain that the defense must be based on the combination of both class and individual interests—with class interests predominating, however; under no circumstances must the counsel search for far-fetched grounds of acquittal; therefore, after Counsel L. came to the conclusion that he had before him a socially dangerous criminal, he acted lawfully in abandoning the defense instead of trying to find circumstances which could mitigate the defendant's guilt.[62]

This opinion is shared by M. D. Kakitelashvili, who considers that the counsel, whether appointed by the court or hired by the accused, has the right to drop the defense if he comes to the conclusion that his client is guilty; in such cases the defense counsel challenges himself, like a judge who feels himself unable to fulfill his duty impartially.[63]

M. Stroyev goes even further in this respect, asserting that the defense counsel has to give a true characteristic of the accused and a reliable picture of the crime, even if they are more unfavorable to the accused than those given by the prosecutor. He commends the behavior of a counsel in a trial in which "the prosecutor tried to find extenuating circumstances in favor of the accused, whereas the defense counsel in his summing up criticized the prosecutor for such groundless attempts and declared that, unfortunately, there are no mitigating circumstances in favor of the accused in this case."[64]

In his book *Criminal Court of the RSFSR*, D. B. Rubinshtein, after having asserted that the Soviet counsel plays the role of an aid to the court and of a control organ obliged to detect the weak sides of the accusatory argumentation, declares that in cases when the material gathered during the trial is not sufficient to repudiate the assertions of the accusation, the counsel is obliged to declare to the court that he has no remarks or new arguments to add to those presented by the prosecutor.[65]

However, it cannot be asserted that there is unanimity in Soviet legal literature on the question whether the counsel has the right to drop the

[62] Yu. Elkin and Vl. Kaufman, "May a Counsel Drop the Defense During the Trial?" Yezhenedel'nik sovetskoy yustitsii (1925) No. 23, p. 843–845.

[63] M. D. Kakitelashvili, "Is it Admissible for an Appointed or Selected Counsel to Resign the Defense of the Interests of the Accused during the Trial?" Yezhenedel'nik sovetskoy yustitsii (1925) No. 29, p. 992–993.

[64] M. Stroyev, "The Role of the Defense in a Criminal Trial," Yezhenedel'nik sovetskoy yustitsii (1925) No. 34, p. 1137.

[65] D. B. Rubinshtein, Ugolovnyi sud RSFSR (Moskva, 1925) p. 113.

defense during the trial. Thus, Al. Levin argues that the Soviet counsel has no right to quit the defense, except in cassation procedure when there are no sufficient reasons for cassation. He is obliged, according to Levin, to carry out the difficult tasks of collecting all the elements in favor of the accused wherever he can find them—in the class position of the accused, his personality, ignorance, illiteracy, financial conditions, in the circumstances of the crime, etc.—and must present the collected material to the socialist court.[66] N. N. Polyansky supports Levin's opinion.[67] D. S. Karev also flatly asserts: "The counsel, in contradistinction to the prosecutor who may drop the accusation, has no right to quit the defense."[68]

Strogovich writes that the time is gone when the question of the right of the counsel to drop the defense was raised. Strogovich considers that the reasoning: "If the prosecutor has the right to give up the accusation, the counsel has the right to quit the defense,"[69] is a sophism, because the accusation of an innocent person is intolerable and illegal, whereas the defense of every person, even of a guilty one, is admissible and legal, provided the methods of defense are honest.

Contrary to Strogovich's opinion, it must be said that the problem of the counsel's right to abandon the defense remains pending up to the present time. Thus, in a letter to the editor of the Literary Gazette, the President of the Presidium of the Leningrad *Oblast'* Advocate College, M. Vladimirov, relates a case in which the counsel during the trial became conscious of the culpability of the accused, although the latter denied his guilt to the end. Abandoning the position taken by the accused, the counsel in his summing up did not ask the court for acquittal but for leniency only. The accused charged the counsel with treason. The behavior of the counsel was discussed in a session of the College Presidium, and many were of the opinion that the counsel was wrong, since his duty was to present competently the arguments of the accused to the court without giving his own opinion. On the other hand, there were members of the College who approved his behavior. Was the counsel right or wrong? asks Vladimirov, leaving the question unsolved.[70]

The problem whether counsel should, or should not, divulge secrets entrusted to him by his clients, is also discussed in Soviet legal literature.

[66] Al. Levin, "Is the Counsel Allowed to Quit the Defense During the Trial?" Yezhenedel'nik sovetskoy yustitsii (1925) No. 35, p. 1165.

[67] N. N. Polyansky, Pravda i lozh' v ugolovnom protsesse, (Moskva) 1927, p. 45.

[68] Karev, *op. cit.*, p. 292.

[69] M. S. Strogovich, "The Position and Functions of the Counsel in Criminal Procedure," Zashchita po ugolovnym delam (Moskva, 1948) p. 35-36.

[70] Literaturnaya gazeta (May 24, 1951) No. 61, p. 2.

T. Kruglov considers that the Soviet counsel has no right to hide from the court what he has learned from his client, since a counsel who would act in this manner would not be an aid to the court; on the contrary, he would deliberately complicate court procedures and bring confusion into a clear case. Such behavior, according to Kruglov, would be not only improper fulfillment of counsel's duty but a crime against the state. Exception should be made, Kruglov thinks, only in the case of circumstances of a strictly personal character, without any influence on the outcome of the trial, which the counsel is not obliged to disclose to the court.[71]

Kruglov's viewpoint became the subject of discussion in an assembly of Moscow lawyers. His thesis that "there is no such thing as an obligation of secrecy for a counsel" was rejected by the majority. It was pointed out that should the counsel be obliged to disclose to the prosecution everything which the accused has confided to him, he would lose all his clients. However, exception was unanimously made for cases of counterrevolutionary crimes, in which, it was said, no secrecy could be tolerated.[72]

Strogovich argues that the question of secrecy is a legal problem and not a matter of lawyer's ethics. To confirm his opinion, he refers to Article 61 of the RSFSR Code of Criminal Procedure, according to which a counsel cannot be heard as a witness in a case in which he acted as defense counsel. But political cases are an exception also in Strogovich's opinion: if the counsel becomes aware of a counterrevolutionary crime, either completed or in preparation, "the counsel is obliged, as a Soviet citizen, to transmit the information to corresponding authorities and resign his activity as defense counsel in the case."[73]

S. N. Abramov in his textbook on Soviet civil procedure extends this exception to all cases in which nondenunciation is punished by criminal law (Article 18 of the RSFSR Criminal Code), "since the protection of the social and political system established in the USSR must prevail over all other interests."[74] In his opinion, the provision established for criminal cases must be applied in civil suits too.[75] In this respect, he disagrees with Chel'tsov-Bebutov, who is against the extension of this provision to civil cases.[76]

[71] T. Kruglov, "Lawyers' Ethics," Sovetskaya yustitsiya (1941) No. 4, p. 11.

[72] Sovetskaya yustitsiya (1941) No. 11, p. 17.

[73] Strogovich, *op. cit.*, p. 38. Such a provision is contained in the Ukrainian Code of Criminal Procedure (Note to Art. 62). Although other Soviet Codes have no similar provisions, Strogovich considers that the matter is self-evident even without specific mention.

[74] S. N. Abramov and others, Grazhdanskii protsess, (Moskva, 1948) 213. In the 1952 edition of this textbook, the justification for the extension is omitted (Abramov, Sovetskii grazhdanskii protsess (Moskva, 1952) 224).

[75] *Ibid.*

[76] M. A. Chel'tsov-Bebutov, Sovetskii ugolovnyi protsess (Moskva, 1929) II, 133.

With regard to the obligation of secrecy of the lawyers, it is of interest to quote here provisions adopted in Albania, one of the Soviet Satellites, completely under Soviet influence. Before the advent of communism, the organization of the legal profession in Albania was similar to that of West European countries. After the organization of the "People's Republic" in 1946, the Law of November 1946 (No. 354) on the Legal Profession provided that "the lawyer is no longer permitted to keep to himself facts which he has learned from the defendant, but is bound to refer them to the investigating authorities." The Law of 1953 (No. 1601) introduced some amendments to this general rule. Article 16 of this Law reads: "Lawyers may keep professional secrets, but they are bound to transmit to State Security all information learned in connection with their professional activity concerning crimes against the state, defined in Articles 64 to 75 and Article 83[77] of the Criminal Code."[78]

Also in Czechoslovakia, where the bar has been similarly sovietized, the keeping of the accused's secrets by the counsel is regulated by law. The Law on the Bar of December 1948 (No. 322) contained the following provision: "A lawyer must divulge a secret confided to him by his client if the Minister of Justice directs him to do so" (Sec. 4).[79] The new Law on the Bar of December 20, 1951, which replaced the Law of 1948, provides that "a lawyer must keep matters confided to him secret unless the party relieves him of this obligation. He is not bound to testify about these matters before a court or an agency of the state, unless the Minister of Justice, for an important state reason, relieves him of this obligation. A lawyer cannot invoke his obligation to keep secrets if under the provision of the Criminal Code, Sec. 165, Subsec. 2,[80] he is bound to inform the authorities of a crime committed. . . ."[81]

In Yugoslavia, according to the Law on the Bar of December 12, 1946, a lawyer may be ordered to testify about secrets of his client whenever government interests and protection of legality are involved. The Minister of Justice of the individual republics and the Lawyers' Chamber may order the lawyer to testify at their discretion.[82]

The comparison of the viewpoints of former Russian and Soviet jurists

[77] Articles 64–75 and 83 refer to crimes against the Albanian State and economic crimes (including those against the Soviet Union and the People's Democracies), etc.

[78] Kemal Vokopola, "Reorganization of the Bar," Highlights of Current Legislation and Activities in Mid-Europe (1955) No. 7, p. 169 and 171.

[79] Stefan Kocvara, "The Bar Sovietized," Highlights of Current Legislation and Activities in Mid-Europe (1956) No. 2, p. 36.

[80] Provisions protecting the Republic and its régime.

[81] Kocvara, *op. cit.*, p. 42.

[82] Dr. Fran Gjupanovich, in Highlights of Current Legislation and Activities in Mid-Europe, 1955, No. 5/6, p. 166.

on the questions whether the counsel has the right to drop the defense during the trial and whether he has the duty to keep secrets of his client, shows how different is the approach to problems of lawyers' ethics. A negative answer to the first question and an affirmative answer without any exceptions to the second one appeared evident to pre-Revolutionary Russian lawyers and scholars. These questions, raised on the occasion of two individual cases and definitely solved by councils of the bar, the Senate, and law, did not provoke even a discussion in legal literature. Quite different is the approach to these questions in the Soviet Union: they give rise to the expression of divergent opinions by Soviet lawyers and scholars. Unanimity exists only with regard to political cases in which the secrecy obligation of the counsel is excluded.

In 1951, the problems of the lawyers' ethics were simply brushed aside by D. Kudryavtsev, USSR Deputy Minister of Justice. In reply to the letters of Lensky and Vladimirov to the editor of the Literary Gazette, Mr. Kudryavtsev wrote:[83]

> Arguments about the dependence of the counsel upon his client, his duty of secrecy, his right to defend a hopeless and unjust case by all means . . . are intolerable and out of place as far as our Soviet lawyers are concerned. Under conditions of socialist justice, there is no place for such "problems." The Marxist-Leninist science on state and law and our communist morality eliminate such questions.
>
> . . . Reasoning about special moral norms of behavior are characteristic for venal bourgeois lawyers, who are ready to make any deal with their conscience in order to defend the interests of the money-bag and their own profit.[84]

Thus, there can be no particular problems of ethics for Soviet lawyers, since their Marxist-Leninist conscience and morality provides for all norms of behavior.

Position of the Soviet Lawyer

The position of the Soviet lawyer is complicated. We have seen that he is often considered as an aid to the court and not merely as a representative of the interests of his client. Let us now quote some opinions of Soviet scholars on this subject.

D. S. Karev considers the position of the Soviet lawyer to be a peculiar one, since two elements are involved in his activity: he is a defender of the accused and at the same time a fighter for socialist legality.[85]

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[83] Literaturnaya gazetta (June 7, 1951) No. 67, p. 2.

[84] Kudryavtsev makes an exception in favor of "those fighting lawyers who accomplish their noble task in bourgeois courts of the USA, England, or France by defending participants in the struggle for peace and democracy from persecutions by courts." *Ibid.*

[85] Karev, *op. cit.*, p. 291–92.

I. T. Golyakov believes that the right to defend cannot consist in exculpating the accused regardless of incontestable facts or in minimizing the danger of his crime. Such a defense, he argues, would be directed against the interests of society and the state.[86] He emphasizes that the defense counsel in the Soviet court is not only a representative of the interests of his client, but also an active participant in the trial who cooperates in truth finding, in passing a sentence which conforms to the essence of the case and to the interests of the state, which on the one hand require the most strict punishment of a criminal and on the other do not tolerate the punishment of an innocent person. "That is why the participation of the counsel and his role in the Soviet court extend far beyond the limits of defense in a bourgeois court."[87]

M. A. Chel'tsov-Bebutov and M. L. Shifman adhere to the opinion that the counsel, although a party in the trial whose duty it is to establish facts which favor the accused, *i.e.* prove his innocence or mitigate his guilt, must nevertheless be endowed with the same socialist sense of legality as the prosecution.[88]

Writing on the same topic, A. Ya. Vyshinsky advises the Soviet lawyer to keep in mind that "the court hall is the laboratory where public opinion is formed"; that unskilled defense may involuntarily become "a banner of narrow-minded, petty-bourgeois, counterrevolutionary moods unfriendly to the Soviet country"; that from professional and political viewpoints a defense is correct when all the arguments in favor of the accused are presented conscientiously "without leaving out of account . . . the basic requirements . . . of socialist construction, state interests, and proletarian dictatorship."

> The position of counsel in court is such that he must often raise his voice in favor of those . . . who in the eyes of all our society are enemies of the Soviet régime. . . . This is an extremely difficult and responsible task. . . His [the counsel's] difficult duty is to speak words of defense in favor of the person whom he himself condemns as a criminal against the Soviet State.[89]

Excellent words, which, unfortunately, are not more than *pia desiderata* under Soviet conditions. In the famous political trial of the *Prompartiya* (Industrial Party), the counsel for the defense, Braude, said in his sum-

[86] I. T. Golyakov, Sovetskii sud (Moskva, 1947) 62–63.

[87] I. T. Golyakov, "On the Significance of the Defense in Soviet Criminal Procedure," Zashchita v ugolovnom protsesse (Moscow, 1948) 14.

[88] M. A. Chel'tsov-Bebutov and M. L. Shifman, "Participation of the Defense in Judicial Proceedings," Zashchita v ugolovnom protsesse (Moskva, 1948) 60.

[89] A. Ya Vyshinsky, Revolutsionnaya zakonnost' i zadachi sovetskoi zashchity (Moskva, 1934) 34–36, passim.

ming up: "The Soviet counsel is primarily a Soviet citizen. He thinks and reasons like the entire working population of the USSR. . . . And together with all the workers, he is seized by indignation, by a feeling of deep inner protest, against the horrors which the accused prepared for our country in creating a base for bloody intervention. They conspired to drown the country in blood, to frustrate the Five-Year Plan and to destroy the national economy."[90] In another, purely criminal, case, the counsel, S. G. Kaznacheyev, started his summing up with the following words: "Comrades Judges, it is difficult to add anything to the strong and brilliant words of Comrade Vyshinsky [the prosecutor]. . . ."[91] Such compliments to the prosecution would be quite impossible on the part of a pre-Revolutionary lawyer. It is remarkable that these two quotations are offered as models by Shifman in his *Handbook of Soviet Criminal Procedure*, intended for the use of students and young advocates.

B. S. Antimonov and S. L. Gerzon in their Book *The Advocate in Soviet Civil Procedure* write:

> The institution of advocates has been created as an aid to the Soviet court. . . . The Soviet advocate is a public figure who strengthens Socialist legality, helps the Soviet State and Soviet justice and who thereby defend the legal interests of citizens and organizations. He who has forgotten this and who strives to secure by all means, with the help of chicanery, solely the interest of his client, does not deserve the exalted rank of a Soviet advocate.[92]

We find similar opinions prevailing in another state behind the iron curtain, in Poland. The Polish bar has been reorganized according to the Soviet pattern. The Law of June 1950 on the Organization of the Bar defines in Article 49 the duty of the lawyer as the obligation "to contribute by all means within his power to protect and consolidate the legal order in the People's State."[93] In Report No. 80 of the Sejm session in which the Law of 1950 was discussed, it is said: "The practice of the legal profession cannot be based on conflict between interests of the individual and those of the government, since in our system there is no such conflict."[94]

In our opinion, a correct definition of the position of Soviet advocates has been given by M. P. Shalamov, who characterizes their organization

[90] M. L. Shifman, Praktikum po sovetskomu ugolovnomu protsessu (Moskva, 1953) 195.
[91] *Ibid.*
[92] B. S. Antimonov and S. L. Gerzon, Advokat v sovetskom grazhdanskom protsesse (Moskva, 1954) 3–4.
[93] S. Rosada, "The Bar," Highlights of Current Legislation and Activities in Mid-Europe (1955) No. 10, p. 265.
[94] *Ibid.*

as a "subsidiary court agency."[95] Evidence for the correctness of such a definition from the viewpoint of a communist government was provided by the speech of the Albanian Minister of Justice in introducing the bill of the law on the legal profession to the Albanian Parliament:

> The [lawyers] must forget from now on how they attended to their professional duties in the past . . . Lawyers must become accessory organs of justice. [Courts and lawyers] must work together.

The minister said further that after the reorganization of justice no opposition between courts and lawyers will exist, since their interests are seen through the prism of the interests of the majority.[96] The organization of the Albanian legal profession, created by the laws of 1946, 1950, and 1953, is very similar to that in the Soviet Union.[97]

Indeed, the Soviet lawyer is a semi-official, not a member of a free profession. He and his comrades are "collectivized" into colleges of advocates and bound to definite legal consultation offices, the chiefs of which assign the cases to individual advocates. In criminal and political trials the counsel is not only the defender of the accused, but also at the same time, an aid to the court in finding the truth. He is handicapped by his double position and the necessity of basing himself on the Marxist-Leninist concept of legality. Especially ambiguous is his position in political cases. If the counsel wishes to present to the court all the circumstances of the case which could acquit the accused or mitigate his guilt, he is bound to criticize the régime or its representatives against which his client has risen. It is obvious that the Soviet lawyer, unlike the free Russian lawyer in pre-Revolutionary courts, is in no position to do so. Speeches like the one delivered by Karabchebsky in the Sazonov Case are certainly impossible in a Soviet court.

And not only in political cases, but in all cases, whether criminal or civil, in which state interests are involved (and how rare are cases in which state interests are not at stake, in one way or another, in the Soviet Union!) the advocate is handicapped when he must represent interests opposed to those of the State. Thus, unlike the pre-Revolutionary Russian

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[95] M. P. Shalamov, Istoriya sovetskoi advokatury (Moskva, 1939). Quoted by P. S. Karev, Organizatsiya sovetskoro suda i prokuratury (Moskva, 1954) footnote 1 on p. 173–174.

[96] Vokopola, *op. cit.*, p. 169.

[97] In Albania, too, the lawyers are "collectivized" and assigned to legal aid offices, the directors of which distribute the cases among lawyers, dispense salaries, etc. *Ibid.*, p. 169–172, *passim*. Also in Czechoslovakia the Soviet example was followed. The rapporteur on the Law of December 20, 1951 said: ". . . as in our whole legal system, here also (referring to the bill of the new Law on the Bar) the pattern of the Soviet Union was of great help to us". (Kocvara, *op. cit.*, p. 40).

lawyer, who was a free defender of the individual against the pressure of the state, the Soviet lawyer as a representative of the individual is limited by his socialist Marxist-Leninist legal sense, which must conform to that of the prosecutor and the court.

The college of advocates is a semi-governmental agency. Its self-administration is a very limited one. The organization of advocates is dependent on the Ministry of Justice, which regulates the election of the presidium of colleges of advocates,[98] supervises admission to the colleges,[99] establishes the schedule of remuneration of the advocates,[100] regulates the training of young advocates,[101] regulates the disciplinary responsibility of advocates,[102] and supervises the entire activity of the colleges by means of a special department of the ministry. The appellate instance in disciplinary proceedings is not the court, but the Ministry of Justice of the Federal or Autonomous Republic. Within the college, the advocate is bound to the legal information office to which he is assigned and cannot change his place of work without the consent of the college presidium. He has no free choice of cases he handles; all of them are assigned to him by the chief of his legal consultation office.

The organization of Soviet lawyers is not a bar in the western sense of the word—the kind of bar which functioned in pre-Revolutionary Russia. The legal profession in the Soviet Union is not a free profession. The Soviet lawyer is not a "fearless knight" of the individual, but an obedient servant of the state—of that same state against which he has to defend his client. Certainly, Mr. Kudryavtsev is right when he asserts: "The Soviet lawyers have nothing in common with the bourgeois lawyers; they differ from them fundamentally and in principle."[103]

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[98] Order of the People's Commissariat of Justice of Oct. 26, 1939, No. 98. In: Sovetskaya advokadura, p. 9.

[99] Order of April 22, 1941, No. 65, *Ibid.*, p. 10.

[100] Orders of October 2, 1939, No. 85; March 25, 1940, No. 29; January 24, 1941, No. 18. *Ibid.*, pp. 11, 19 and 20.

[101] Instruction of April 23, 1940, No. 47. *Ibid.*, p. 22.

[102] Order of April 11, 1940. *Ibid.*, p. 26.

[103] Kudryavtsev, *op. cit.*, p. 2.

Comments

ENGLISH AND IRISH LAND LAW—SOME CONTRASTS

The division of the island of Ireland into two distinct political units was effected by the Government of Ireland Act, 1920[1] and the Irish Free State (Agreement) Act, 1922. One of these units, the Irish Free State (then a Dominion within the British Commonwealth), has since become the Irish Republic, separate from the United Kingdom and the British Commonwealth. The other, Northern Ireland, continues to form, with England and Scotland, one political unit, "The United Kingdom of Great Britain and Northern Ireland." Before this division, Ireland was a "common law" country; and each of these units continued to maintain its existing law and judicial system, based on the common law of England. Further, each is affected by statutes enacted by the parliaments which formerly had or now have authority within its territory. The former parliaments were (i) the Parliament of Ireland, which existed from the end of the thirteenth century until 1800, and (ii), the Parliament of the United Kingdom of Great Britain and Ireland, which ended with the creation of the Irish Free State in 1922. In addition, authority over the island of Ireland was claimed by the Parliament of England and by the Parliament of Great Britain (which existed from 1707 to 1800). The legislative bodies now exercising authority over the island are, in the Irish Republic, the *Oireachtas* or National Parliament and, in Northern Ireland, the Parliament of the United Kingdom of Great Britain and Northern Ireland (to which certain matters are reserved),[2] and the Parliament of Northern Ireland.

Prior to the 1920–1922 settlement, the Irish courts were not bound by the decisions of the English courts, though English decisions were always treated with respect. Decisions of the House of Lords sitting in appeals from Ireland, or upon law common to both countries were, however, regarded as binding. Since 1922, the courts of the Irish Republic have tended to depart from English decisions to some extent, but the better view there seems to be that although English decisions will continue to receive respectful consideration, only the pre-1922 decisions of the House of Lords are actually binding. In Northern Ireland, however, it appears that English authorities will be followed, even where the matter is considered to be doubtful[3].

When we turn to consider the application of the doctrines of English land law in Ireland, it is important to realise that although the common law came to

[1] See F. H. Newark, "Judicial Review of Confiscatory Legislation under the Northern Ireland Constitution," 3 A.J.C.L. (1954) 552.

[2] *Ibid.*

[3] *Minister for Finance v. O'Brien* [1949] I.R. 91, 150, per Black J.; *Boylan v. Dublin Corporation* [1949] I.R. 60, 77, per Black J.; *Re Northern Ireland Road Transport Board* [1941] N.I. 77, 100, per Murphy L.J. *Cf.* Delany, "The Development of the Law of Charities in Ireland," 4 I. & C. L.Q. (1955) 30.

Ireland with the Normans in 1169, nevertheless the area of the country over which the King's writ ran remained an extremely restricted one for many centuries.[4] At first, no complete conquest of territory was contemplated by the invaders, and from the outset, the principle of two distinct systems of law was recognized—the old Irish customary law, or "Brehon law," and the feudal law of medieval England. Between them, the cleavage was complete. The Anglo-Norman administration regarded the common law as being personal rather than territorial, and it was a privilege to be extended or witheld at the will of the government. The tradition that King John granted a charter conferring the common law on Ireland at large is now generally rejected, and it is quite certain that the right to use the common law was something which the individual Irishman must obtain from the Crown by charter, for himself and his heirs.[5] There is, however, evidence that even in the King's courts, the old Irish law was frequently pleaded in cases involving the ownership of land, the practice either being a preliminary determination of the legal issues involved by Irishmen skilled in this law, or their assistance being requested by the common law judges. As late as the beginning of the seventeenth century, there are occasional references in the State Papers to the native "regions," which show the survival of the old law there, though by then there must have been a considerable intermingling of the two systems.[6]

From 1603 onwards, however, the common law of England spread throughout Ireland with increasing momentum and rapidity. Two decisions of the King's Bench in the reign of James I virtually destroyed the whole structure of the customary system of land tenure, one of these declaring the Brehon law custom of galvelkind succession to be illegal, while the other condemned the allied custom of "tanistry."[7] These declarations by the judiciary were followed by a general surrender of lands to the Crown, followed by a regrant to the proprietors under feudal tenure in fee, by letters patent. Accompanying this process came the superimposition of the system of tenure and estates on the country as a whole. The system was given the force of law by the enactment of an Irish version of the Statute of Uses and the Statute of Wills in 1634,[8] and the rebellions in the middle of that century, with their attendant confiscations and regrants, left the vast majority of the Irish land owners holding their estates under patents from the Crown, and a small number holding under allodial tenure or immemorial usage.

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[4] Johnson, "The First Adventure of the Common Law," 36 L.Q.R. (1920) 9; Amos, "The Common Law and the Civil Law in the British Commonwealth," 50 Harv. L.R. (1937) 1249.

[5] Calendar of Justiciary Rolls, Ireland, 1295–1303, p. 271.

[6] O'Connor Morris, "The Land System of Ireland," 3 L.Q.R. (1887–8) 133; 4 L.Q.R. 1; W. E. Montgomery, The History of Land Tenure in Ireland; D. Binchy, "The Linguistic and Historical Value of the Irish Law Tracts," Proceedings of the British Academy, (1943) 29.

[7] *Case of Gavelkind*, Dav. Ir. 134; *Case of Tanistry*, Dav. Ir. 78.

[8] (1634) 10 Car. I. sess. 2, c. 1. This included both the Statutes of Uses and Wills, and corresponds to (1535) 27 Hen. VIII, c. 13, (1535) 27 Hen. VIII, c. 16, and (1540) 32 Hen. VIII, c. 1.

The peculiar features of the Irish forms of land tenure which then arose, and which it is now proposed to examine, sprang from the fact that the area of land included in these Crown grants was too large for the grantee to retain the whole of it in his own hands, and that due to the political circumstances of the time, he was very reluctant to deal directly with the native Irish peasantry. This difficulty was resolved by the creation of a number of subgrants of the land, carved out of the superior Crown grant, to persons who lived on the land, or part of it, and sublet the remainder. These "middlemen," as they were called, often found that they themselves had more land than they could conveniently manage, and so they too sublet, and it became a commonplace to find as many as a dozen middlemen interposed between the Crown grantee and the peasant occupier. This extensive subdivision led to the anomalous tenures which we must now consider.

1. *The Fee-Farm Grant*—At first these sublettings were carried out by means of a grant of the fee, subject to a perpetual rent reserved to the grantor. This form of tenure was, of necessity, very rare in England. Before the Statute *Quia Emptores*,[9] the term "fee-farm" included every rent or service reserved on a grant in fee;[10] but after that statute, granting in fee-farm, except by the Crown, became impracticable, because the grantor, divesting himself of the fee, was by the operation of *Quia Emptores* without any reversion and, without a reversion, there could be no "rent-service," or rent which conferred a common law power of distress.[10a] In Ireland, however, many of the seventeenth century Crown patents contained a licence to grant in fee, reserving a rent, and in addition, special statutes might confer a similar power to do so.[11] Hargrave, in his edition of *Coke upon Littleton*,[12] said ". . . I have seen a modern grant in fee of a large estate in Ireland, reserving a perpetual rent of great value. But such a rent, considered as a fee-farm rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor, and his heirs and assigns, to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears should be paid, the rent might be good as a rent-charge."

Apart from the intervention of the legislature in the nineteenth century,[12a] these fee-farm grants as a mode of creating estates in land were gradually superseded by another device, which provided the grantor with more effectual remedies for the recovery of the rent. The real disadvantage of the fee-farm grant was the difficulty in recovering the rent reserved, and as early as 1712,[13]

[9] (1290) 18 Edw. I, c. 1, extended to Ireland by (1495) 10 Hen. VII, c. 22 (Ir.)

[10] 2, Bl. Comm. 42, citing Co. Litt. 143.

[10a] But *cf.* Montrose in 2 N.I.L.Q. (1938) 196.

[11] e.g. The Church Temporalities Acts.

[12] Vol. I, 143b, n. 5. *Cf.*: *Bradbury v. Wright* (1781) 2 Doug. 624 [99 E.R. 395], reporter's note; Montrose, "Fee-farm Grants in Ireland," N.I.L.Q. (1938–40) 2–4, *passim*.

[12a] Renewable Leasehold Conversion Act, 1849.

[13] 11 Anne, c. 2 (Ir.). *Cf. Verschoyle v. Perkins*, 13 I.E.R. 72; *Buller v. Archer*, 12 I.C.L.R. 104; *Delacherois v. Delacherois*, 8 I.C.L.R. 1; 11 H.L.C. 62.

the Irish parliament enacted legislation to give a power of distress and re-entry in case of nonpayment, notwithstanding the absence of a reversion. These grants are still very common in Ireland, however, and much of the land is held under them.

2. *Perpetually Renewable Leases*—The defects in the system of granting estates in fee-farm led to the introduction of another form of landholding peculiar to Ireland. This was the lease for lives, perpetually renewable. It was a lease *pur autre vie*, for the lives of the persons named therein, and the survivor of them, with power to add new lives, coupled with an agreement by the lessor to grant new leases from time to time for ever, on the termination of the lives. As each life fell in, and the lease had to be renewed, the tenant paid a lump sum to the landlord, called a "renewal fine." The origin of this system is uncertain,[14] but it soon became a very common type of tenure, for it stimulated the tenant to improve the land,[15] while the necessity of renewals ensured to the lessor a frequent recognition of his title. In a country often disturbed by rebellion, such periodic recognition was important, for it often happened, in the course of years, that no rent was paid. In this connection, the renewable lease had a considerable advantage over the fee-farm grant, for in that type of tenure, the grantor might have had considerable difficulty in establishing his right.[16] Many renewable leases, indeed, contained clauses suspending the payment of rent in case the demised premises should be wasted, destroyed, or become decayed because of war or rebellion, so that the tenant would be forced to abandon them.[17]

The object of fixing the time for the renewal of the lease was to obtain a recognition of the title of the lessor, and to enable the latter to enforce payment of the rent and "renewal fines." Moreover, the Irish courts of equity extended the principle of granting relief to the tenant against mere delay in renewing, where there had been no fraud, and early in the eighteenth century, it was settled that compensation of the lessor, not forfeiture of the lease, was to be the test. Accordingly, even where the lessee failed to renew in accordance with his strict convenant, he did not lose his right to do so, provided he paid up the arrears of rent, together with an additional "fine" on the expiration of each period of seven years after the falling of any life.[18] This, of course, produced great irregularity in renewals, and after doubts had been cast on the doctrine by the House of Lords,[19] it was confirmed by a statute of the Irish parliament.[20]

In the nineteenth century, legislation was passed to enable these perpetually

[14] In 1697, the Duke of Ormonde procured an act of the English parliament enabling him to grant leases for lives of his settled estates in Ireland (8 & 9 Will. III, c. 5). *Cf.* 13 Harv. L.R. (1900) 472.

[15] *Boyle v. Lysaght*, 1 Ridg. P.C. 384.

[16] *Barrett v. Barke*, 5 Dow. P.C. 376.

[17] *Lord Inchiquin v. Burnell*, 3 Ridg. P.C. 376.

[18] *Anderson v. Sweet*, 2 Bro. P.C. 256.

[19] *Bateman v. Murray*, 1 Ridg. P.C. 181.

[20] Tenantry Act, 1780 (19 & 20 Geo. III, c. 30 (Ir.)).

renewable leases to be converted, by deed, into fee-farm grants,[21] and although this has been effected in many cases, renewable leases still exist in Ireland to puzzle the student unfamiliar with the practice. In addition, Irish ecclesiastical corporations were given power to make leases for lives, and many of these are still extant.[22]

3. *Peasant Proprietorship*—Until about seventy years ago, the Irish peasant farmer was very much in the position of the English tenant at will.[23] He occupied the lowest position in the edifice of land-holding and as a general rule, his interest in the land was treated by the landlord as expiring with him. He had no right to assign it, and any improvement which he might carry out upon the land would result in his rent being increased. In the province of Ulster, where the influx of Scottish settlers had produced special conditions, a well-established body of customary rules—"The Ulster Tenant-Right"—grew up, whereby a tenant was secured in the possession of his holding, was not subjected to inordinate increases of rent, and was regarded as having a saleable interest in his tenancy.[24] This custom, however, did not extend beyond the boundaries of that province (of which Northern Ireland now comprises two thirds), and the position of the peasant farmers in the remainder of the country remained unsatisfactory. Famine conditions in the mid-nineteenth century led to economic instability amongst the landed classes, and the mortgaging and incumbrancing which resulted had the effect of making land virtually unsaleable. The government intervened by passing the Incumbered Estates Act, 1849, which was, in effect, a special bankruptcy law for the benefit of the owners. Any incumbrancer could obtain an order for the sale of the lands through a special court, and the Crown then conveyed them to the purchaser freed from all mortgages and other liabilities.

From 1870 onwards, the legislature spent a great deal of time in passing Irish land laws, the ultimate object of which was to create a class of peasant proprietors, owning the soil they tilled.[25] At first, this system of "land purchase," as it was called, confined its scope to fixing fair rents as between landlord and tenant, and to negotiating voluntary agreements for the sale of the lands to the tenants. This was effected by means of monetary advances made to the tenant by the government, repayable over a period of years, and the system was later extended to cover the sale of large estates, embracing many

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[21] Renewable Leasehold Conversion Act, 1849.

[22] Church Temporalities Act, 1833.

[23] *Cf.* Montgomery (note 6, *supra*), *passim*; A. G. Richey, The Irish Land Laws (1880); Report of the Commission on the Occupation of Land in Ireland. 1845 [605] xix. 1. The literature on this topic is voluminous.

[24] For the history of the Ulster Tenant-Right, see, Montgomery, *op. cit.*, p. 73, 117; for its incidents, see, *Lendrum v. Deazley*, 4 L.R. Ir. 645; *McElroy v. Brooke*, 16 L.R. Ir. 74; *Stevenson v. Leitrim*, 7 I.L.T.R. 34; *Adams v. Dunseath* (*No. 2*) [1899] 2 I.R. 542.

[25] The best account is: H. C. Bowen, Statutory Land Purchase in Ireland prior to 1923 (1928).

hundreds of tenants, under the supervision of a land commission.[26] After World War I, this purely voluntary procedure was replaced by a compulsory vesting in the state of all agricultural land, with compensation for the owner, followed by ultimate revesting in the new peasant proprietor.[27] In Northern Ireland, where, due to the existence of Ulster Tenant-Right, the problem was not so acute, this revesting process has now been completed,[28] but in the Irish Republic, the difficulties which have beset the framers of agricultural policy have caused postponements. There, the necessity for creating an "economic holding" in a country which has been subjected to centuries of subdivision of the land, has necessitated the regrouping of farms, the expropriation of the indolent, and in many cases the compulsory migration and resettlement of large sections of the agricultural population. The final assessment of the Irish land policy has yet to be made, and the whole topic is a fruitful one for the economist, the sociologist, and the lawyer.[29]

4. *Recording of Titles*—Unlike England, Ireland has had, since 1707,[30] a nationwide system for the registration of all written dealings in land. Registration is not compulsory, but it is in effect so, since unregistered dispositions are void as against registered ones, while registered deeds rank inter se in order of their registration. In addition, Northern Ireland has a system of public land charge registration, which has been operating there since 1951.[31]

Recording of titles, as distinct from mere recording of deeds, has been in force since 1891[32] with respect to the titles of all lands sold under the land purchase code, and the title does not pass until it is registered. In respect of other lands, title registration is purely voluntary and, in fact, very little use has been made of this part of the machinery. It is interesting to note, too, that land which is compulsorily registered descends on intestacy as personalty, the reason being that although the peasant owner now has a fee simple estate, his former interest in the land, as tenant at will or for years, was of the nature of personalty, and this has been preserved by the registration statute.

Conclusion—Perhaps the most interesting feature of modern Irish land law is that it remains almost entirely unaffected by the reforms carried out in England during the period 1922–1926. In the Irish Republic, the scheme of

[26] Irish Land Act, 1903, and amending legislation down to 1921.

[27] Land Act, 1923 (Irish Republic); Northern Ireland Land Act, 1925 (Northern Ireland).

[28] For detailed account of the process, see, Quekett, "The Completion of Land Purchase in Northern Ireland," 4 N.I.L.Q. (1940) 26, 67.

[29] A good account is: O'Sheil, "The Changes effected by recent Land Commission Legislation," (1954) Public Administration in Ireland (ed. King), Vol. III, 295; *Cf.*, Pomfret, The Struggle for Land in Ireland; E. R. Hooker, Readjustments of Agricultural Tenure in Ireland. Both these works are by American observers.

[30] Irish Registry Act, 1707. (6 Anne, c. 2 (Ir)).

[31] Statutory Charges Register Act (N.I.), 1951. *Cf.*, Murray, "The Statutory Charges Register Act," 9 N.I.L.Q. (1951) 90.

[32] Local Registration of Title (Ir.) Act, 1891. *Cf.*, Fortescue-Brickdale, "Registration of Title in Ireland," 7 L.Q.R. (1891) 184; "The Local Registration of Title (Ir.) Act, 1891," 8 L.Q. R. (1892) 97; Glover, Registration of Ownership of Land in Ireland (1933).

intestate succession retains the distinction between real and personal estate, the rule of primogeniture still applying to the devolution of real property.[33] The fact that a large proportion of the land is, in fact, held by purchasers under the land purchase code renders this distinction of diminishing importance, however, and current legislation in Northern Ireland aims at the introduction of the modern English rules of succession, the realty—personalty dichotomy being abolished.[34]

In both parts of Ireland, entailed interests still exist, and the strict settlement, the Statutes of Uses and Inrollments,[35] and the *Rule in Shelley's Case* survive to perplex the law student. By an odd anachronism, the relationship between landlord and tenant, with its dependence on tenure and reversions, which still exists in the law of England, was swept away in Ireland as early as 1860,[36] when the relationship was placed on a purely contractual basis, the landlord retaining his rights, such as distress, which depended on tenure and service. On the other hand, both dower and tenancy by the curtesy are still to be found in the Irish Republic, existing side by side with lesser interests in land, of a contractual nature, such as "conacre"[37] and "agistment."[38]

On the whole, there is little tendency towards the wholesale reform of the land law, the legislatures being content to patch up the now rather tattered fabric of the feudal system as the occasion demands. All these differences, however, tend to emphasize the extreme flexibility of the most technical of all branches of the common law, which has readily adapted itself to the Irish climate and surroundings.

V. T. H. DELANY*

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[33] See L. A. Sheridan, "Irish Private Law and the English Lawyer," 1 I. & C. L. Q. (1952) 196, *et seq.*

[34] Administration of Estates Bill (N.I.), 1955, which, if enacted, will come into force on January 1, 1956. *Cf.*, Report of the Committee on the Law of Intestate Succession in Northern Ireland 1952 (Cmd. 308); 10 N.I.L.Q. 3.

[35] Note (8) *supra.*

[36] Landlord and Tenant Law Amendment Act (Ir.), 1860. *Cf.*, R. R. Cherry, Irish Land Law and Land Purchase Acts 1860–1901; L. A. Sheridan, *loc. cit.*, note (33) *supra.*

[37] A contract for the sale and removal of a growing crop. *Cf.*, *Booth v. McManus*, 12 I.C.L.R. 435; *Dease v. O'Reilly*, 8 L.R. Ir. 59. It is not regarded as being a demise of the land, but is merely in the nature of a temporary easement.

[38] A contract for the grazing of cattle belonging to another. No tenancy is created, but only a right in the nature of a *profit à prendre. Cf.*, *Mulligan v. Adams*, 8 I.L.R. 132.

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RENVOI IN SWISS LAW

I

As is well-known, Switzerland, like most civil-law countries, has two formal sources of law: statute and custom (Article 1, I and II, Swiss Civil Code). But in the field of private international law, the principal statute, the Federal Act of June 25, 1891, has many gaps. For instance, it is reticent on the classical problems: public policy, evasion of law, characterization, renvoi, etc. For these, as custom (in the continental meaning) is not normally recognized as a source of conflicts law, it is left to the judge, according to the celebrated formula of Article 1, II *in fine* of the Code, to lay down "the rule which he as a legislator would adopt."[1] Consequently, general[2] answers to these problems, if any, have to be sought in the decisions of the courts, more especially of the Federal Tribunal. But these, it must be borne in mind, even when delivered by the highest court (the Federal Tribunal), do not have the force of law.[3]

Before undertaking a review of the few reported federal cases which are connected in some way with the renvoi problem, it may be useful to dispel a long-lived belief. Article 28, 2, of the Act of 1891 does not enact the mechanism of the renvoi, whether as transmission, or even as remission. Therefore, it is impossible to infer any conclusion from this provision as respects the general intent of the Act. The pertinent text of this section, in Falconbridge's translation,[4] reads as follows:

> "Article 28. The following rules are applicable to Swiss citizens domiciled abroad as regards the law of persons, family law and succession law, subject however to the special provisions of international treaties: . . . 2. If, according to the foreign legislation, these Swiss citizens are not governed by the foreign law, it is the law of the canton of origin which is applied to them" . . .

Today, the construction of these provisions is no longer doubtful. According to the Federal Tribunal,[5] Swiss citizens domiciled abroad, as regards the law of persons, family law, and the law of succession, are generally subject to Swiss civil law (which has been unified since January 1st, 1912), *unless* the rules of conflict of the country where they are domiciled declare the domestic rules of

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[1] *Cf.* R. P. Shick's translation of the Swiss Civil Code, Boston, 1915.

[2] There are special answers for some cases. E.g., Article 7f, I, *in fine*, Act of 1891, relative to *fraus legis*, as regards the conclusion of a marriage in a foreign country.

[3] As for the Swiss doctrine, the most recent trend seems rather renvoi-minded. See Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts (1954) 273–276; Schnitzer, 1 Handbuch des internationalen Privatrechts (3d edition, 1950) 203–205.

[4] Essays (1954) 241.

[5] Rehbeil v. Habegger, April 3, 1952, 78 B.G.E. (1952) II, 200; Heckmann v. Kraushaar, February 2, 1955, 81 B.G.E. (1955) II, 17; *cf.* already in re Deggeller, March 16, 1898, 24 B.G.E. (1898) I, 7, 15. Out of date: Vormundschaftsbehörde Sumiswald v. Schütz, March 5, 1937, 63 B.G.E. (1937) II, 2; as well as Rabel's statement, 1 Conflict of Laws (1945) 81.

such country applicable. The Heckmann case added that the connecting factor must be the domicile (and not, for instance, the nationality of another person).[6] Only in this case, will a Swiss court apply the internal foreign law. As Lewald clearly has pointed out, the competence of Swiss law is subordinated to a negative condition.[7] It is easy to see that this mechanism has nothing to do with renvoi, although, when the conflict rules of the country of domicile refer for any reason to Swiss law, the result is the same.

II

The cases, summarized below, in which the Federal Tribunal has had occasion to consider the question of renvoi, are few:

Two earlier decisions are generally quoted together. The one (1894) rejects the renvoi, the other (1895) accepts it.

1. *Fischel v. Codmann*, April 6, 1894, 20 B.G.E. (1894) 648. A complete statement of the facts is lacking in the official report. However, it is not difficult to reconstruct them. A married woman, who was a citizen—whether of Massachusetts or Pennsylvania is not stated—sojourned in Zurich (Switzerland), where she bought a valuable carpet. When required to pay the price, 4,520.– Swiss francs, she alleged that the contract was void, on the ground of her incapacity to enter into it. She won in the lower courts, by application of the law of Zurich, but the Federal Tribunal, characterizing differently, found that the capacity had to be determined according to the law of the national country (Article 10, II, Act of June 22, 1881).[8] It, then, evoked the famous problem:

"One could ask, it is true, whether the *lex patriae* is to be applied even if, as regards the capacity of its own citizens, the foreign state acknowledges the principle, not of nationality, but of territoriality; nevertheless one has to understand that the law-making power intended

[6] Pomarolli v. Furrer, March 24, 1927, 53 B.G.E. (1927) II, 89, would probably receive today another solution. The mother was Austrian. The defendant in the filiation proceeding was Swiss, domiciled in Austria at the time of the cohabitation. Austrian domestic law was applied, according to Article 28, 2, and to the fact that the Austrian rule of conflict referred to the national law of the mother. Today Swiss law would be competent.

[7] "Renvoi revisited," Festschrift Hans Fritzsche (1952) 178. *Cf.* earlier, Meili, 1 Das internationale Civil- und Handelsrecht auf Grund der Theorie, Gesetzgebung und Praxis (1902) 717; and further, Nussbaum, Deutsches internationales Privatrecht (1932) 55, n. 3; Schoch, 55 H.L.R. (1942) 751, n. 80. On the whole question, see Holleaux's comment on the Rehbeil case, 42 Revue Critique (1953) 781 ff. As this author remarked, the construction is somewhat similar to Lerebours-Pigeonnière's peculiar system of subsidiary connections; Précis (6th ed. 1954) No. 259, pp. 277–281, and we could add, to Niboyet's auxiliary reference to the *lex fori*, 3 Traité (1944) No. 1015, pp. 473–476.

[8] The Act of 1891, and its Article 7, I, submitting the capacity of married women to the *lex domicilii*, were not applicable to foreigners domiciled abroad. It may be useful, further, to notice that this Article 7, I, intended for intercantonal relations, became obsolete in 1912, when the Swiss Civil Code went into effect. Consequently, Article 10, II, Act of 1881, previously applicable to foreigners in general, including foreign women domiciled abroad (*cf.* Article 34, Act of 1891), replaced, in 1912, the aforesaid Article 7, I, Act of 1891, as to foreign women domiciled in Switzerland. See Schnitzer, *op. cit.*, 268. To this extent, Miss Schoch's statement in 55 H.L.R. (1942) 750, n. 68, could be misleading.

to give a final answer to the question [of the applicable law] without considering whether the foreign state has extended the scope of its law to its citizens domiciled abroad" (p. 653).

Thus, the remission[9] is rejected in the most expressive way. Was it necessary to take position? Very likely. But not, perhaps, for the reason given by the court. It was not at all certain that the defendant was domiciled in Zurich (in the eyes of an American judge). In any event, her husband was not. And, at that time, it is doubtful that the wife could elect a separate domicile. Nonetheless, reference could have been made to the law of Zurich, because, apparently, the contract had been made in Zurich, and the *locus contractus* was a possible connecting factor for the question of capacity.

2. *Martiny v. Martiny*, March 27, 1895, 21 B.G.E. (1895) 114. The case is not international, but intercantonal: the civil law had not yet been unified.

A married couple, domiciled in Zurich, obtained a judgment of divorce. The proprietary interests were settled according to the law of the first matrimonial domicile (Article 19, I, Act of 1891, concerning the matrimonial regime[10]). Fribourg was the place of the first matrimonial domicile. Now,

"Article 19, I, intended to refer to the law of the first matrimonial domicile considered as a whole. This law includes also the corresponding rules of conflicts ('Statutenregelung') ... [The third country's] law appears to be, in a certain way, an integral part of the law of the first matrimonial domicile" (p. 121–2).

The only conflict rule which could come into account happened to be a provision quite similar to the famous Article 3 of the French Civil Code. It was easy to show that this rule, relative to personal status, did not apply to the matrimonial regime. Finally, then, although the principle of renvoi was accepted, the domestic law of Fribourg was applied.

The *Fischel* and *Martiny* cases are utterly inconsistent with each other. Furthermore, they are quite old (the Federal Tribunal began its permanent activity in 1875). Therefore, they are hardly conclusive, but if it were necessary to point out which is the more significant, stress ought to be laid, exceptionally, on the older.[11] Indeed, while it was sensible to dispose of renvoi in the first case,

[9] This was indeed a remission, *cf.* Schnitzer, *op. cit.*, 206, n. 7; Nussbaum, *op. cit.*, 53, n. 7. Niederer speaks of transmission, *op. cit.*, 271, n. 38, probably because the husband, Mr. Codmann, apparently lived in a third state, Rhode Island. But it is obvious that the court hesitated between Zurich law, on the one hand, and "American" law as a whole, on the other, and not between Massachusetts or Pennsylvania law, and that of Rhode Island.

[10] After 1912, Article 19, I, Act of 1891, would no longer have applied to the proprietary consequences of a divorce. The new Articles 7g *et seq.* would be competent.

[11] It may be interesting to notice that two of renvoi's first antagonists, reviewing the case law, quote the Fischel case, but neglect the Martiny case. See Anzilotti, Studi (1898) 227–8; Bartin, 30 Revue du Droit international (1898) 136, n. 2. (Perhaps they only read Clunet, 1894, p. 1095, which does not seem to have reported the second case.) The famous Tallmadge case, at a time (October 1919) when the decisions of 1894 and 1895 were certainly the only two Swiss federal cases to be known, placed Switzerland among the adversaries of the renvoi, 181 N. Y. Supplement, 346. In 1930, Petitpierre, stating the private international law of Switzerland, in the La Pradelle-Niboyet-Goulé Répertoire, VII, p. 145 *et seq.*, wrote that, generally

the same question, in the second case, was meaningless: the Swiss law of conflicts having been unified for three years, how was it possible, in 1895, to look for a cantonal rule of conflict? Thus, the renvoi problem was nonexistent, and it may be allowed to speak here of a mistake. Moreover, the statement about renvoi in the *Fischel* case seems to be more seriously considered than the corresponding paragraph of the *Martiny* case: the latter does not even mention the former, and refers, among the "foreign" (cantonal) rules of conflict, to one which was scarcely connected with the subject matter.

After forty years, the problem reappears in two more decisions of 1934 and 1935, which, though seemingly favorable to renvoi, do not bring much light.

3. *Huwyler-Imboden v. Schneider-Huwyler*, January 19, 1934, 60 B.G.E. (1934) II, 1.

Mr. Huwyler, a widower, suffered arteriosclerosis and was becoming mentally deficient; the Zurich authorities considered appointing a guardian for him. At the same time, Mrs. Imboden, a divorced woman of bad reputation, sought to secure his assets. She induced him to go with her to Brighton, England, where they were married. He died two months later.

His daughter (by a former marriage), Mrs. Schneider-Huwyler, brought an action in order to avoid the second marriage. She succeeded, the Swiss domestic law (Articles 97 and 120, 2, C.C.) being applied, principally, because there was abundant evidence of *fraus legis* (*cf.* Article 7 f, I, Act of 1891) and, subsidiarily, because "English law refers back to the law of the domicile, as regards foreign persons domiciled abroad" (p. 6–7). Moreover, the English domestic law would likewise have avoided such marriage.

The Huwyler case does not provide a general answer to the question of renvoi. On the one hand, the use of the renvoi was only secondary, if not superfluous, as English domestic law would have sufficed to avoid the marriage. It confirms a result which had been reached already on a different ground (evasion of law). On the other hand, renvoi is, here, applied to the particular field of family status. And even the most resolute adversaries of the renvoi sometimes accept it, or have recourse to similar reasonings, lest someone be considered, at the same time, as married, divorced, and a bachelor[12] (*cf. infra*, *Caliaro and Wydler* case).

4. *De Vayne van Brakell Buys v. De Vayne van Brakell Buys*, February 7, 1935, 61 B.G.E. (1935) II, 12.

Also in this case, a husband suffered mental disease. For that reason, a gift

speaking, the Swiss rules of conflict referred to domestic law, No. 113, p. 158. Finally, as we shall see later, in 1935, the Federal Tribunal itself cited the Fischel case, to the exclusion of the Martiny case (*cf. infra*, De Vayne van Brakell Buys case).

[12] The well-known case, Lando v. Lando, October 21, 1910, Supreme Court of Minnesota, 112 Minn. Rep. (Wenzell), 257, follows quite a different reasoning. The aim was to safeguard the validity of a marriage celebrated abroad by Minnesota people. *Favor matrimonii* prevailed over any other consideration, and led the Minnesota court to adopt a fancy construction of Article 13, I, German E.G.B.G.B. The marriage was most probably void for German law.

to his wife was sought to be avoided. Capacity, it has been seen (footnote 8), is governed by the law of the country of which the subject is citizen. At this point in its argument, the Federal Tribunal proceeds as follows:

"It could be asked whether the Swiss judge would apply the foreign *lex patriae* even if the national country declares competent the law of the place of domicile and the place of domicile happens to be the place of the *forum* (as this Court has affirmed in 20 B.G.E. (1894) 653). To solve this question, much discussed in the doctrine, and variously answered in the tribunals of many European countries, but predominantly in the sense of the acceptance of this remission (*cf.* Nussbaum, *Deutsches internationales Privatrecht* (1932) 52), is however not necessary, since, as to capacity, The Netherlands also follow the principle of nationality" (p. 18).

Does this mean anything *pro* or *contra?* At most, we may infer from this case, what the Federal Tribunal thought was its previous position: rejection of the renvoi, according to *Fischel v. Codmann. Martiny v. Martiny* is consciously omitted.[13] And the fact that the *Huwyler* case is equally ignored indicates how little weight was attached to it.

5. About ten years later, *Chambers & Eiseler v. Isay*, June 27, 1946, 72 B.G.E. (1946) III, 100, seemed, again, to favor renvoi.

This case involved the succession of the late Professor Isay, who had died domiciled in Berlin. Though he had left some property in Switzerland, German aw was applicable (analogy with Article 22, I, Act of 1891). It was held:

"German law, quite generally, submits the succession of a German (Isay was a German) to the German domestic law. . . . As to the property left in a foreign country, it is true that priority is given to the particular rules which may exist in the *situs* (Article 28, German E.G.B.G.B.). But Switzerland has no such particular rules" (p. 104).

Why did the Swiss Court concern itself with the foreign law of conflicts? It is really difficult to find any explanation of the statement quoted, which did not add much to the result. Domestic German law was eventually applied, and would also have been applied, had no reference been made to the German E.G.B.G.B. Thus, we have once more to do with nothing more than a dictum of dubious value.

6. Much more suggestive is *Remund v. Klein*, May 18, 1951, 77 B.G.E. (1951) II, 113.

This was a filiation proceeding, the mother and the child being Swiss citizens, the defendant, French. Since he was domiciled in France at the time of the cohabitation (which itself took place in France),[14] French law was competent, according to a jurisprudential construction of Article 2 of the Act of 1891:

"Truly, this rule must not be understood only as a simple reference to the internal law of the domicile. However, to say that the federal law requires an application of the foreign con-

[13] That it is consciously omitted is evidenced by the fact that the Tribunal quotes Nussbaum, who himself had cited both the Fischel and Martiny cases (*op. cit.*, 53, n. 7).

[14] If the cohabitation had taken place in Switzerland, it would have been possible to apply Swiss domestic law: Pomarolli v. Furrer, quoted footnote 6; Viscolo v. Berthet, September 29, 1938, 61 Semaine Judiciaire (1939) 220.

flict rules is, at most, possible within the limits of the corresponding Article 28, Act of 1891, namely, if the foreign rule of conflict chooses, as a connecting factor, an element of the defendant's personal status (as, for instance, his nationality)" (p. 116).

In other words, renvoi could be accepted in some cases, but not in the case at bar, because the French (jurisprudential) rule of conflict considered the nationality of the *child*, which is not an element of the defendant's personal status, as the connecting factor. Now, the Federal Tribunal deduces this partial acceptance of the renvoi from a certain interpretation of Article 28 of the Act of 1891, based, itself, on a renvoi-mechanism. However, since 1952, this interpretation has been abandoned (*cf. supra*, footnote 5). Consequently, we can safely say that even a partial acceptance of renvoi is, in this field, out of date.

7. *Caliaro and Wydler v. Aargau, Regierungsrat*, November 11, 1954, 80 B.G.E. (1954) I, 434, did not, in itself, raise the problem of renvoi. But, for some reason difficult to guess, the Federal Tribunal delivered an important *obiter dictum*.

This case involved the validity of a marriage celebrated in England between an Italian and a Swiss woman. Had the Italian the capacity of marrying? Reference was made to his *lex patriae* (Article 7 c, I, Act of 1891). This was negatived, because the divorce from a prior marriage was not recognized in Italy. However, while this is not here of interest, it was stated:

"If the law of the national country refers, not to its own domestic rules, but to the rules of another country (as, for instance, of the place of celebration, or of the domicile), account is to be taken of such reference since the recognition of the marriage in the national country, which is the important thing, depends on the very law of this other country" (p. 440).

Nothing could be more explicit. Thus, use of renvoi in the question of matrimonial capacity, proposed in the *Huwyler* case (*cf. supra*), is confirmed and can be considered, henceforth, as a part of the Swiss law of conflicts. One will remember that it was already positive law within the limits of the Hague Convention on Marriage, of June 12, 1902.[15]

The result thus far of the reading of the Swiss federal cases is disappointing. But for one exception (matrimonial capacity[16]), no precise answer could be

[15] Article 1: "The capacity of contracting a marriage is governed by the national law of each spouse, unless a provision of this national law refers expressly to another law."

That nothing can be inferred, respecting the subject matter of renvoi, from the conventional law is obvious. The conventional law of Switzerland does not necessarily reflect the Swiss standpoint.

Besides the Hague Convention of 1902, quoted above, reference may be made to the Uniform Bills of Exchange Act, of June 7, 1930, formally incorporated in the Swiss domestic law. Conv. II, Article 2, I (Article 1086, I, Federal Code of Obligations) reads: "The capacity of a person to bind himself by a bill of exchange or promissory note shall be determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law shall be applied." (Hudson, 5 International Legislation (1929–31) No. 259, p. 552).

[16] Which could be, perhaps, extended to the whole field of family status, marriage, legitimacy, bastardy (but not divorce, which is subject to particular rules of conflict). It is to be kept in mind that, for Swiss lawyers, family "status" has a narrow meaning (French "*état*"). For instance, filiation proceedings do not affect family status.

given, in 1954, to the question of renvoi.[17] It was, at most, possible to discern a slight trend towards its rejection (*Fischel v. Codmann* and *Remund v. Klein*).

III

8. How far has the problem been clarified by the recent decision of the Swiss Federal Tribunal in *Guaranty A. G. v. "Astra," Gesellschaft für internationalen Handel und Vertretung* (October 21, 1955, 81 B.G.E. (1955) II, 391)? The facts were as follows:

A contract was made in Zurich between a Swiss corporation domiciled in Zurich, Guaranty, and a Yugoslav corporation domiciled in Zagreb, Astra. Astra was to pay 60,000,000 Italian lire in Milan to a third party, to be designated by Guaranty. In return, Guaranty promised to provide payment of 88,888 free dollars in Zurich and to secure certain guaranties. One of these guaranties being refused by the Yugoslav National Bank, Astra sought to rescind the contract, and, as a matter of fact, did not pay the 60,000,000 Italian lire. Invoking breach of promise, Guaranty sued Astra for damages in Zurich, the *forum arresti*.

Since the parties had disclosed no intention, express or tacit, respecting the applicable law, the trial court applied the law of the country with which the contract had the closest territorial connection.[18] This, the trial court determined, was the Italian law, since the characteristic obligation, that of Astra, was to be performed in Milan. Moreover, this obligation was expressed in Italian money. In such case, as the trial court noticed, the Italian rules of conflict referred to the law of the place where the contract had been made (Article 25, Disp. Prel. C. C.), i.e., Swiss law. This typical renvoi was accepted, and the suit was dismissed pursuant to Swiss law. In the present appeal by Guaranty, the

[17] As a matter of fact, the cantonal courts do not appear to have been more categoric A. good proof of this statement is given by the tribunals of Zurich:

1. Obergericht Zurich, January 50, 1951, 50 Blätter für Zürcherische Rechtsprechung (1951) No. 40, p. 75: filiation proceeding. Mother and child, Swiss. Defendant, French, domiciled in France at the time of the cohabitation. The renvoi, from the French to the Swiss law, as the child's *lex patriae*, was accepted. Compare with the Remund case.

2. Obergericht Zurich, December 18, 1951, 49 Schweizerische Juristenzeitung (1953) 62: filiation proceeding. Mother and child, Swiss. Defendant, an Austrian, domiciled in Austria at the time of the cohabitation. The renvoi from Austrian to the Swiss law, as the mother's *lex patriae*, was rejected.

Two opposite decisions in one year.

[18] On the proper law of the contract, the Swiss rule of conflict now reads (*cf.* especially Chevalley v. Genimportex, February 12, 1952, 78 B.G.E. (1952) II, 74; Künzle v. Bayrische Hypotheken- und Wechselbank, August 31, 1953, 79 B.G.E. (1953) II, 295):

1. The subjective will of the parties is to be followed (subject to a certain limitation of freedom), if it is possible to discover it in the concrete case.

2. Otherwise, the closest territorial connection of the contract shall determine the applicable law.

It is one of the merits of the *Chevalley* case to have construed the latter proposition as furnishing an objective criterion, rather than as reflecting a hypothetical or presumed intention of the parties, as previously understood.

Federal Tribunal decided: first, that the Swiss rule of conflict referred to the Italian law; second, that in the application of Italian law the conflict of laws rule in Article 25, Italian Disp. Prel. should be disregarded. The case was accordingly remanded to the court of first instance. The reasoning of the Federal Tribunal respecting the possible renvoi can be divided into three parts:

(a) If the parties, explicitly or by implication, had chosen the law of the contract, no doubt could arise; the renvoi should be rejected, on the grounds:

"For one who contemplates determining the question of the law to be applied in a contract, does not go half the way, merely referring to a conflicts rule. Even if he proposes to follow the circuitous path of such a rule, he is in position to reproduce its content and thereby precisely to designate the domestic law that is to govern the contract" (p. 393–4).[19]

In other words, autonomous choice of law and renvoi exclude each other. This rather obvious solution is proposed by most of the writers who admit the renvoi in other instances.[20]

It is true that the cases in which a renvoi would be conceivable, are infrequent. Indeed, as Batiffol has remarked, autonomous choice of law being now accepted in the majority of the countries,[21] it is difficult to find many conflicts of rules of conflict on this point. Such conflicts are of course the first condition of a renvoi.

(b) Nor, in the absence of any manifested choice, as in the case at bar, if the court constructed the hypothetical will of the parties, would doubt arise:[22] the

[19] Of course, one could imagine, as Arminjon did (1 Précis (3d edition, 1947) No. 196, p. 377), the case where the parties have referred expressly to the foreign *rules of conflict*. Then the renvoi should apply.

[20] See, for instance, Raape, Internationales Privatrecht (4th edition, 1955) 67; Batiffol, Traité élémentaire de droit international privé (2nd edition, 1955) No. 311, p. 368 (compare, however, his Conflits de lois en matière de contrats (1938) No. 53, p. 47); Niederer, *op. cit.*, 276–277; Wolff, Deutsches Internationales Privatrecht (3rd edition, 1954) 78 V and 143; Wolff, Private International Law (2nd edition, 1950) No. 189, p. 197; Nussbaum, Grundzüge (1952) 97; *id.*, *op. cit.*, 222, n. 3; Dicey-Morris (6th edition, 1949) 581, n. 12; Rabel, 2 *op. cit.* (1947) 387; Melchior, Die Grundlagen des deutschen internationalen Privatrechts (1932) No. 159, p. 238, etc. See, further, Falconbridge, Essays (2nd edition, 1954) 142, 243 n.q., 336, 402–406; Bayitch, "Connecting Agreement," 7 Miami L. Q. (1953) 312; Cook, Logical and Legal Bases (1942) 398 ff.; Haudek, Die Bedeutung des Parteiwillens im internationalen Privatrecht (1931) 94.

One will remember, however, Duskin v. Pennsylvania Central Airlines Corporation (April 14, 1948, Circuit Court of Appeals, Sixth circuit) 167 F. 2d 727: A contract of employment between a pilot and the corporation defendant was formally submitted to the law of Pennsylvania. The pilot crashed in Alabama. Alabama law was eventually applied to the damage suit, according to the Pennsylvania rule of conflict "that the law of the place where the operative facts occurred must govern the rights of the parties" (p. 732). It sounds as though the fields of contracts and torts were not accurately distinguished.

As to Vita Food Products, Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277, Lord Wright's famous dictum (p. 292) has been severely criticized, *cf.* Falconbridge, *op. cit.*, 402–406; Sharwood, "Renvoi and Contractual Choice of Law," 5 A.J.C.L. (1956) 120 *et seq.*

[21] Batiffol, *op. cit.*, No. 311, p. 368. For proof of this statement: Yntema, "'Autonomy' in Choice of Law," 1 A.J.C.L. (1952) 341 ff., especially 345–353.

[22] See Raape, *op. cit.*, 67; Nussbaum, Grundzüge (1952) 97.

connecting factor would still be the *intention*, which is considered as directed to a domestic law, not a private international law. This would exclude renvoi, although conflicts of rules of conflict are possible, e.g., as between the rules of place of contracting and place of performance.

(c) Since 1952 (*cf. supra*, footnote 18), the Federal Tribunal no longer refers to a nonexistent intention. It prefers to apply an objective rule; the result is the same, but the way to reach it is more realistic. However, where the idea of any intention is thus excluded, should a possible renvoi be accepted?[23] This the Federal Tribunal has negatived:

> "It cannot be the meaning of the Swiss international law of obligations to attach to the closest territorial connection between a legal relation and a certain state merely the consequence of determining the applicable *rule of conflict* of such state. Reference to such closest territorial connection is made, not to enable the question of the applicable substantive law to be resolved generally in any manner, but since the Swiss judge considers, in the absence of divergent agreement of the parties, that the domestic law of the state to the sphere of which the legal relation is most closely connected, is the objectively correct, the mandatory one [to apply] . . . Not to apply this law, because in the respective state there is a rule of conflict that refers back to the Swiss law, or over to the law of a third state, would mean to forego the materially correct solution in favor of one that, according to Swiss standards, is not opportune" (p. 394–395).

Does not this repeat the most striking objection to renvoi?[24] And an objection of general scope? Consequently, is it not possible to conclude that in the *Guaranty* case, the Federal Tribunal has ranged itself definitely with the adversaries of renvoi (the exception of the *Caliaro and Wydler* case, being of course reserved)? Indeed, the renvoi was rejected in an unqualified manner: an *objective* rule of conflict was expressly construed as referring to a *domestic* foreign law.

Nevertheless, prudence is commendable in the interpretation of the Swiss cases. The Federal Tribunal is not to be enclosed in the limits of narrow statements. It should be noticed especially, that the wide field of succession, which in a way is the Eden of the renvoyists, and still remains one of their favored gardens, has not as yet been ploughed by the Tribunal.[25]

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[23] Melchior, *op. cit.*, No. 159, p. 239, clearly distinguished these two cases and answers: no, for the former, and yes, for the latter. Apparently affirmative answer, for case 3, in University of Chicago v. Dater, 1936, Supreme Court of Michigan, 277 Mich. Rep. (Bond), 658, and negative answer in Lann v. United Steel Works Corporation, January 14, 1938, Supreme Court of New York, 1 N. Y. Suppl., 2nd series, 951.

[24] *Cf.*, for instance, Cheshire, Private International Law (4th edition, 1952) 67: "English private international law has been amended because it does not meet with the approval of the lawmaker in Italy. This indeed is the apotheosis of comity. It comes perilously near to a surrender of legislative sovereignty."

[25] But for the rather inconclusive Isay case, *cf. supra*.

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CONFLICT OF LAWS IN RECENT EAST-EUROPEAN TREATIES

The conflict of law rules in treaties, bilateral or multilateral, have been praised for their truly international character, avoiding narrow domestic qualifications and unbalanced "political solutions."[1] While such provisions are not rare, they are for the most part scattered and deal only with specific questions.[2] Relatively comprehensive rules in bilateral treaties are the exception. The only postwar treaties that contain such sets of conflict rules are three recent East-European treaties:

Agreement Concerning Mutual Legal Relations in Civil and Criminal Cases between Czechoslovakia and Poland, signed at Warsaw, January 21, 1949 (31 U. N. Treaty Series 205).

Treaty on Legal Assistance in Civil and Criminal Matters between Czechoslovakia and Hungary, signed in Budapest, March 6, 1951 (no English translation published).[3]

Treaty on Legal Assistance in Civil and Criminal Matters between Hungary and Bulgaria, signed in Budapest, August 8, 1953 (no English translation published).[4]

Surprising as it may seem that East-European countries should cultivate treaty-made conflict of laws, these treaties really continue a specifically Balkan tradition.[5] After World War I, the newly created successor states of the Austro-Hungarian monarchy concluded a closely knit system of treaties on mutual judicial assistance, some of which contained a catalogue of conflict rules.[6] These the new treaties partly replace, partly supplement.[7]

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[1] See Rabel, 1 Conflict of Laws (1945) 37; R. Plaisant, Les règles de conflit de lois dans les traités (1946) 15 *et seq.*

[2] The only collection, partially outdated, seems to appear in Makarov, Die Quellen des Internationalen Privatrechts (ed. 1, 1929); the first volume of the second edition, containing statutory provisions, has appeared (1953), the second volume on treaty law is in preparation.

For the United States, see Bayitch, "Conflict Law in United States Treaties," 8 Miami L. Q. (1953/54) 501–529, 9 Miami L. Q. (1954/55) 9–41, 125–147.

[3] Ratified on October 10, 1951, promulgated in Hungary by Decree Law no 29/1951 (Magyar Közlöny 1951, p. 1089).

[4] Ratified on December 24, 1953, promulgated in Hungary by Decree Law no. 2/1954 (Törvényerejü Rendeletek 1954, p. 143). For the translation of both texts into English, I am greatly indebted to Dr. Vera Bolgár, University of Michigan, Law School, Ann Arbor.

[5] It is certainly not accidental that the man who recently called the attention of American lawyers to the conflict rules in U. S. Treaties, Professor Bayitch (*supra* n. 2), should have come from the Balkans.

[6] (1) Czechoslovakia-Yugoslavia of March 17, 1923 (30 L. of N. Treaty Series 185), especially arts 18–34; (2) Bulgaria-Yugoslavia of November 26, 1923 (26 L. of N. Treaty Series 85) without conflict provisions; (3) Austria-Poland of March 19, 1924 (56 L. of N. Treaty Series 95), especially arts. 21–32, 84, 86, and the final protocol; (4) Hungary-Rumania of April 16, 1924 (42 L. of N. Treaty Series 165), especially arts. 4–12; (5) Bulgaria-Rumania of April 19, 1924 (33 L. of N. Treaty Series 209), especially arts. 13, 14; (6) Poland-Czechoslovakia of March 6, 1925 (46 L. of N. Treaty Series 201), especially arts. 7–12; (7) Rumania-Czechoslovakia of May 7, 1925 (54 L. of N. Treaty Series 17), especially arts. 19–36; (8) Bulgaria-Czechoslovakia of May 15, 1926 (60 L. of N. Treaty Series 203), without conflict provisions.

[7] The new Czech-Polish Treaty of 1949 replaces (see art. 89 par. 3) the Treaty of 1925

It is proposed to analyze here the body of conflict rules contained in these latest treaties, to contrast them with the national conflicts law of the respective countries[8] and to evaluate their contribution for an internationally co-ordinated law.

I. Scope of Treaty-made Conflict Rules

Conflict provisions in treaties supersede the unwritten or the statutory conflict rules of a country. This principle, so self-evident that it rarely is spelt out,[9] results from the adage "*Lex posterior derogat legi prior.*" Another question arises immediately: to what extent is the national conflict rule abrogated, or conversely, what is the scope of the conflict rule contained in a treaty? Normally, the wording of the rule or a special clause indicates clearly that in bilateral treaties such provisions are limited to conflicts cases arising between the laws of the two "High Contracting Parties." Hence, in matters of personal status, a legal relationship (like adoption or succession) will be governed by the law of the contracting party to which the "decisive" person "belongs"; in a proprietary relationship, the location of the property in the territory of one of the contracting parties will be decisive, etc. In technical terms, the "connecting factor," e.g., the nationality or domicil of a person, the situs of a thing, the place of acting, must be within the personal or territorial sovereignty of one of the parties, in order to make the treaty provisions applicable. This general rule on the scope of treaty provisions serves as a guide in the interpretation of doubtful or carelessly drafted clauses. Conflict rules, though apparently phrased for general application, in bilateral treaties generally will be understood with the above-mentioned restricted scope of application; this strict interpretation, for example, is necessary with regard to article 21, paragraph 1, of the Hungarian-Bulgarian Treaty, providing that "The capacity of persons is governed by their national law."[10] In the following discussion, this limitation of the scope of the conflict rules in question is not explicitly mentioned.

(preceding note, no. 6); the Czech-Hungarian Treaty of 1951 has no predecessor; also the Hungarian-Bulgarian Treaty of 1953 has no direct predecessor. The Austro-Hungarian-Bulgarian Treaty of May 31, 1911, which terminated on December 31, 1917, was revived between Bulgaria and Austria on October 20, 1922, not, however, between Bulgaria and Hungary; this treaty, moreover, did not contain any conflict provisions.

[8] The national conflict laws are stated and will be cited as follows: Poland: Law on private international law of August 2, 1926; Czechoslovakia: Law on private international law of March 11, 1948 (English translation: 31 J. Comp. Leg. and Int. Law 78–88); Hungary: provisions in the Law on marriage, family, and guardianship No. IV/1952 and in the Decree Law No. 23/1952 for the execution of this law; Bulgaria: there are no relevant conflict rules enacted.

French and German translations of all texts in Makarov, Quellen (*supra* n. 2).

[9] Only in the Czechoslovakian Law of 1948, s.71.

[10] This provision, which has no parallel in any of the corresponding Balkan treaties, was probably adopted literally from the Hungarian proviso (see following note) without considering its necessary adaptation to the scope of the treaty.

II. The Conflict Rules

1. *Capacity.* Only the Hungarian-Bulgarian Treaty includes a provision: the capacity of persons is governed by their national law (art. 21 par. 1); however, in the usual transactions of everyday life, the law of the place of contracting is decisive (par. 2). The former rule conforms to Hungarian conflicts law[11] and to the general continental approach determining capacity by reference to the personal law.

The exception of paragraph 2 in favor of the local law is of interest. This is the first time that the numerous, hidden, complicated, but limited inroads on the nationality principle which in this field have had to be conceded by European courts and legislators have been expressly recognized in a formal rule. Other treaty provisions paved the way.[12] But none of these had simply enacted the competence of the *lex loci contractus*. However much Anglo-American lawyers may rejoice at this step towards their conception, the ensuing division of the rule on capacity presents a new difficulty: the qualification of "usual transactions of everyday life."

In practice, however, the whole provision is rather useless; the same treaty contains express rules on capacity in special cases (incapacity for purposes of guardianship, art. 28 par. 1; capacity to make or to revoke a will, art. 37); moreover, the substantive laws of Bulgaria and Hungary agree on the age of 18 as the commencement of majority.[13]

2. *Incapacity; Guardianship and Trusteeship.*[14] Guardianship exists for persons who are incompetent, either because they are minors or because, after having attained majority, they have been declared incapable. Most of the earlier Balkan treaties contain quite extensive rules on guardianship, phrased broadly enough to cover, in case of adults, the incidental question of declaration of incapacity.[15] This inclusive rule has been copied by the two Hungarian treaties, whereas the Czech-Polish Treaty singles out the declaration of incapacity, only to repeat in four special articles practically all the principles governing guardianship (arts. 22–25).

These principles, continuing the tradition of three of the older treaties, are as follows:[16]

(a) *Jurisdiction.* The authorities of the country of which the incompetent is a national have general jurisdiction; in cases of emergency or if the domestic

[11] Decree Law No. 23/1952, 5.42 par. 1.

[12] See the survey by Plaisant (*supra* n. 1) 306 ff.

[13] Bulgaria: Law on Persons and Family of August 5, 1949, art. 2; Hungary: Decree Law No. 23/1952, s. 21 par. 2. There are minor differences in the conditions of limited capacity.

[14] Curatorship, of course, in the continental sense (*curatela*), i.e. without transfer of legal title of the incompetent's property to the curator. Curatorship is submitted to the same rules as guardianship and, therefore, will not be mentioned expressly.

[15] Czech-Yugoslav Treaty of 1923, art. 28; Austro-Polish Treaty of 1924, arts. 21–25; Czech-Polish Treaty of 1925, art. 10; Czech-Rumanian Treaty of 1925, art. 23.

[16] Czech-Yugoslav Treaty of 1923, art. 28; Czech-Rumanian Treaty of 1925, art. 23; Czech-Polish Treaty of 1925, art. 10.

authorities so request, there may be a partial or total transfer to authorities of the other country.[17] However, in these exceptional cases, according to the two latest treaties, decisions of the requested authorities on the personal status of the foreign incompetent are expressly excluded from their competence.[18]

(b) *Choice of Law.* The general rule on jurisdiction implies the application of the national law; this basic rule has been expressly confirmed by the most recent of the treaties.[19] In the few exceptional cases in which jurisdiction is exercised over a foreign incompetent, the authorities apply their domestic law;[20] correspondingly, the legal relations between guardian and incompetent ward are governed by the law of the appointing authority.[21] This digression from the pure nationality principle is mitigated by the exclusion of decisions on the personal status of the foreign national.[22] From the Hungarian-Bulgarian Treaty which is silent as to the applicable law in the case of transferred authority, the same results seem to flow.[23]

Among the special rules dedicated by the Czech-Polish Treaty of 1949 to the declaration of incapacity is a conflicts provision cumulating the *lex fori* and the national law of the incompetent person.[24] This is the only deviation from the general rules for guardianship.

These rules remain within the general frame of continental conflict law as worked out in the Hague Convention on Guardianship of 1902 and the other Balkan treaties. Some refinements, especially with regard to the régime of transferred guardianships, may be noted.[25] However, it may be questioned whether the complete exclusion of foreign courts to pronounce on the incapacity

[17] Czech-Polish Treaty of 1949, art. 19; Czech-Hungarian Treaty, arts. 17–29; Hungarian-Bulgarian Treaty, art. 28 par. 2–30.

In accord, the national conflict law of Poland: Law of 1926, arts. 24, 25; similarly Czechoslovakia: Code of Civil Procedure (1950) s. 613 par. 2, sentence 1; Hungary: Decree Law No. 23/1952, s. 20.

[18] Czech-Hungarian Treaty, art. 29 par. 2 sentence 2; Hungarian-Bulgarian Treaty, art. 30 par. 2. The Czech-Polish Treaty of 1949, like its predecessor of 1925, does not contain this restriction. On the other hand, it can be found in the older Balkan treaties of Czechoslovakia-Yugoslavia of 1923, art. 28 par. 4 sentence 2, and in the Czech-Rumanian Treaty of 1925, art. 23 par. 4 sentence 3.

[19] Hungarian-Bulgarian Treaty, art. 28 par. 1.

[20] Expressly, Czech-Hungarian Treaty, art. 29 par. 2 sentence 1. The Czech-Polish Treaty of 1949 is mute on this point, but the supplemental national conflict rules lead to the same result, Poland: Law of 1926, art. 26 sentence 2; Czechoslovakia: Code of Civil Procedure (1950) s. 613 par. 2 sentence 2.

[21] Czech-Polish Treaty of 1949, art. 20 par. 2; Czech-Hungarian Treaty, art. 30 par. 2; Hungarian-Bulgarian Treaty, art. 31 par. 2.

[22] *Supra* n. 16.

[23] This conclusion seems warranted by a combination of art. 28 par. 1 (incompetent's national law governs guardianship), art. 30 par. 2 (transfer to foreign authority does not include jurisdiction on decisions affecting personal status), and art. 31 par. 2 (legal relationship between guardian and incompetent governed by law of appointing authority).

[24] Czech-Polish Treaty of 1949, art. 23 sentence 2.

[25] These improvements seem to be inspired by the German-Polish Treaty on Guardianship of March 5, 1924 (49 L. on N. Treaty Series 251).

of a foreign, but domiciled or resident adult, as provided in the two Hungarian treaties in contrast to the Czech-Polish Convention, is commendable.

Finally, the provision that the duty of a prospective guardian to accept his office is governed by his national law,[26] should be remarked. This rather unique rule is derived from the recent Czechoslovakian codification.[27]

3. *Declaration of Death.* (a) *Jurisdiction*, again, normally rests with the courts of the missing person's national country.[28] The rather vague exception which gave jurisdiction to foreign courts "in cases of necessity," as carried over by the Czech-Polish Treaty of 1949 from its Balkan predecessors,[29] has been replaced in the two Hungarian treaties by an enumeration of two precise cases:[30] the domicil of the missing person's spouse in the country; or claims with regard to an immovable of the missed person if these claims arise from the marital property régime or from succession. The latter clause is a conscious effort to avoid divergent qualifications resulting from the fact that the legal consequences of the death of a spouse on the matrimonial property are governed, partly by the rules on the effect of marriage, partly by those on succession.

(b) *Choice of Law.* Application of the missing person's national law is but a confirmation of the traditional basic rule on the continent. It is significant, however, that the application of the *lex fori* in cases of the extraordinary jurisdiction for a foreigner's declaration of death, as asserted by the Mid-European countries sometimes in abnormal proportions, e.g., in Western Germany,[31] and followed by the Czech-Polish Treaty of 1949[32] as well as by the Polish and the Czech national conflict law,[33] has been abandoned in the two recent Hungarian treaties.[34] These maintain, even in declarations concerning foreigners, the applicability of the missing person's national law. This strict adherence to the personal law is very commendable and permits the recognition of the ensuing decree in the missing person's national country;[35] only in case of a domicil of the missing person in a foreign country, does the practicability of this determination of the personal law appear doubtful.

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[26] Czech-Polish Treaty of 1949, art. 20 par. 3; Czech-Hungarian Treaty, art. 30 par. 1; Hungarian-Bulgarian Treaty, art. 31 par. 2.

[27] Czech Law of 1948, s. 33. The only other enacted rule in the Finnish statute of December 5, 1929, s. 42, looks also to the national law, excepting, however, the apparently only practical case, viz. domicil of the guardian-to-be in Finland in which case Finnish law is to be applied.

[28] Czech-Polish Treaty of 1949, art. 26 par. 1; Czech-Hungarian Treaty, as well as Hungarian-Bulgarian Treaty, art. 22 par. 1 respectively.

[29] Czech-Polish Treaty of 1949, art. 26 par. 2; Czech-Polish Treaty of 1925, art. 12; Czech-Rumanian Treaty of 1925, art. 36.

[30] Czech-Hungarian and Hungarian-Bulgarian treaties, art. 22 par. 2, respectively.

[31] Law on missing persons (Verschollenheitsgesetz) of 1939, as amended 1951, s. 12.

[32] Czech-Polish Treaty of 1949, art. 26 par. 2, following the provisions of the other Balkan treaties, see *supra* n. 29.

[33] Poland: Law of 1926, art. 4 par. 2; Czechoslovakia: Law of 1948, s. 5, Code of Civil Procedure (1950) s. 617 par. 2.

[34] Czech-Hungarian and Hungarian-Bulgarian treaties, art. 22 par. 3, respectively.

[35] *Cf. infra* n. 64.

Certainly not only the requirements, but also the effects of the declaration of death are governed by the national law; this may become relevant, e.g., in determining whether the declaration dissolves the marriage bond of the missing person, a question otherwise resolved differently in the contracting countries.[36]

4. *Paternity, Legitimacy, Parental Relations.* (a) *Choice of Law.* The parallel provisions on paternity in the two Hungarian treaties differ only in scope; the rule in the Czech-Hungarian treaty is limited to the determination, or rather rebuttal, of the legally presumed legitimate birth of a child,[37] that of the Hungarian-Bulgarian Treaty comprehends, in addition, the determination of an illegitimate paternity.[38] The first treaty follows the Czech national conflicts rule, the second the Hungarian.[39] The latter seems to be more justified on account of the radical abolition of any legal distinction between legitimate and illegitimate children in the East European postwar legislations.

In both cases, the putative father's national law governs.[40] This is the traditional solution, e.g., indirectly admitted by the earlier Balkan treaties, which provide for the exclusive jurisdiction of the courts in the supposed father's national country.[41] However, this rule is limited to the establishment of paternity. The effects of paternity once determined—the Hungarian-Bulgarian Treaty again wider in scope regarding parental relations in general—are subject to the child's national law at his birth,[42] thus providing for the immutability of the applicable law.

The lack of a conflicts rule in the Czech-Polish Treaty of 1949 is perhaps explained by the nearly uniform legislation on persons and the family, proposed at that time and later enacted in the two countries; however, what justifies then the other conflicts rules? On the other hand, the differences between the Czech, Hungarian, and Bulgarian laws on the subject matter, though confined to minor deviations, necessitated the enactment of rules in the Hungarian treaties.

(b) Reversing the above-mentioned formula of the Balkan treaties, *jurisdiction* now, in general, follows the applicable law with a reasonable exception in case the domicil of both parties is in the same country.[43]

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[36] For dissolution: Czech C.C., s. 8; Hungarian Law No. IV/1952, s. 17. No dissolution: Bulgarian Law on Persons and the Family (1949) art. 17.

[37] Czech-Hungarian Treaty, art. 23.

[38] Hungarian-Bulgarian Treaty, art. 24.

[39] Czechoslovakia: Law of 1948, s. 20; Hungary: Decree-Law No. 23/1952, s. 17 par. 1 (but with certain reservations in favor of the child's law).

[40] See *supra* notes 37 and 38.

[41] Czech-Yugoslav Treaty of 1923, art. 33 par. 1; Bulgarian-Rumanian Treaty of 1924, art. 13 par. 1; Hungarian-Rumanian Treaty of 1924, art. 11 par. 1; Czech-Rumanian Treaty of 1925, art. 21 par. 1. Contra: Czech-Polish Treaty of 1925, art. 9 par. 1 (courts of the child's national country).

[42] Czech-Hungarian Treaty, art. 24; Hungarian-Bulgarian Treaty, art. 25.

[43] Czech-Hungarian Treaty, art. 25; Hungarian-Bulgarian Treaty, art. 26. The treaties thus confirm a modern trend, expressed in the respective national codes, Czech Law of 1948, s. 27 sentence 1; Hungarian Decree Law No. 23/1952, s. 17 par. 2, both, however, with ample reservations in favor of the *lex fori*.

5. *Adoption.* Jurisdiction for adoption being conceded in all the treaties exclusively to the authorities of the adopter's national country,[44] implies already a choice of law; the Hungarian-Bulgarian treaty also explicitly spells out the rule.[45] But the child's national law determines which additional consents from the child or its representatives are required.[46] This exception, like the main rule, is in line with the previous treaty law.[47] In this respect, it may be noted that the Hungarian treaties assure the observance of a special protective provision of Hungarian substantive law requiring an authorization for the adoption of a Hungarian child by a foreigner.[48] This, like similar rules of certain Scandinavian countries, is disregarded by the traditional rule providing only for the consent required, under the child's personal law, of the child, or his legal representatives or guardian.[49] This gap has been filled in the Hungarian treaties by adding a reference to the required consent of an authority.

The authoritative statement of rules regarding the invalidation of an adoption, seems to be original. Whereas the Czech-Polish treaty simply declares the general rules on adoption applicable,[50] the Hungarian treaties apply the national law of the adopted at the time of invalidation.[51] This time element characterizes the rule as an exception to the unspoken basic rule, viz., that the effects of the adoptive relationship are determined by the law governing at its inception.

6. In the field of *succession*, two traditional rules are unanimously confirmed: the law governing succession is the deceased's national law at the time of his death;[52] but special rules on the succession of certain property in one country are binding, whether they refer to restrictions of a disposition by will[53] or generally limit succession.[54] Two treaties confirm, for the capacity to inherit, the "Central European" rule, which cumulates the law governing the succession with the national law of the beneficiary.[55]

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[44] Czech-Polish Treaty of 1949, art. 27 par. 1; Czech-Hungarian Treaty, art. 26 par. 1; Hungarian-Bulgarian Treaty, art. 27 par. 2.

[45] Art. 27 par. 1.

[46] Czech-Polish Treaty of 1949, art. 27 par. 2; Czech-Hungarian Treaty, art. 26 par. 2; Hungarian-Bulgarian Treaty, art. 27 par. 3.

[47] Bulgarian-Rumanian Treaty of 1924, art. 14 par. 2; Hungarian-Rumanian Treaty of 1924, art. 12 par. 2; Czech-Rumanian Treaty of 1925, art. 22 par. 2.

[48] Decree Law No. 23/1952, s. 18.

[49] German EGBGB, art. 22 par. 2; Czech Law of 1948, s. 31; Czech-Polish Treaty of 1949, art. 27 par. 2.

[50] Czech-Polish Treaty of 1949, art. 28.

[51] Czech-Hungarian Treaty, art. 26 par. 3; Hungarian-Bulgarian Treaty, art. 27 par. 4.

[52] Czech-Polish Treaty of 1949, art. 29 par. 1; Czech-Hungarian and Hungarian-Bulgarian treaties, art. 33, respectively.

[53] Czech-Polish Treaty of 1949, art. 30; Czech-Hungarian Treaty, art. 34.

[54] Hungarian-Bulgarian Treaty, art. 34.

[55] Czech-Polish Treaty of 1949, art. 29 par. 2; Czech-Hungarian Treaty, art. 32, following the Polish Law of 1926, art. 28 par. 2, the Austro-Polish Treaty of 1924, art. 27 par. 2, and the Austro-German Treaty on Succession of February 5, 1927 (73 L. of N. Treaty Series 205) s. 1 par. 1 sentence 2.

Equally conservative are the rules on wills. A uniform provision validates the forms of the testator's national law at the time of execution or revocation or, alternatively, of the place of making the will.[56] The two Hungarian treaties contain an express proviso determining capacity to make or to revoke a will by reference to the testator's national law at the time of the execution or revocation;[57] it is perhaps remarkable that the legal consequences of lack of intention are especially mentioned in this rule. The Hungarian-Bulgarian Treaty, article 36, allows the inclusion of other substantive requirements in the rule; are there any more besides capacity and soundly expressed intention?

The treatment of heirless successions deserves attention. The subject matter is not sufficiently settled to avoid some experimentation. Here again, the Czech-Polish treaty of 1949 follows closely the line of the earlier Balkan treaties by providing that qualification as an "heirless succession" is to be taken from the law governing the succession.[58] The somewhat amazing silence of the treaty on the legal effects of such established heirlessness seems to reinstate the most basic principle in this field, based on the sovereignty of each state: the acquisition of heirless property, movable or immovable, by the state in the territory of which it is situated.[59] The Czech-Hungarian Treaty, on the other hand, is silent on the special qualification of heirlessness which probably allows this question to be referred to the law governing the succession. The Hungarian-Bulgarian treaty, finally, chooses a third course; it obviates any difficulty of qualification by specifying three instances of heirlessness (no heirs, all heirs waive, or have lost the capacity to inherit),[60] the occurrence of which will probably have to be derived from the law governing the succession. As respects distribution, the two Hungarian treaties follow a system familiar to Anglo-American lawyers in the general field of succession, though discarded for the special problem of the heirless estate: movables devolve upon the state of which the testator was a national, immovables upon the state in which they are located.[61] This solution at least avoids the still more questionable method currently in vogue of qualifying the claim of a foreign state as either that of an "*ultimus heres*" or as "*bona vacantia*."[61a]

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[56] Czech-Polish Treaty of 1949, art. 31; Czech-Hungarian and Hungarian-Bulgarian treaties, art. 36, respectively.

[57] Czech-Hungarian and Hungarian-Bulgarian treaties, art. 37, respectively.

[58] Czech-Polish Treaty of 1949, art. 29 par. 3.

[59] Former treaties provided expressly for the qualification according to the laws governing both the succession and the distribution, see, e.g., Austro-Polish Treaty of 1924, art. 30; Austro-German Treaty (*supra* n. 55), s. 4.

On the other hand, not only distribution but also qualification of the estate as "heirless" according to the *lex situs* was envisaged by the Czech-Rumanian Treaty of 1925, art. 27.

[60] Hungarian-Bulgarian Treaty, art. 35.

[61] Czech-Hungarian and Hungarian-Bulgarian treaties, art. 35, respectively. The only precedent seems to be an early Spanish-Greek Treaty on Succession of March 6, 1919 (3 L. of N. Treaty Series 81), art. 16.

[61a] See recently, *Re* Maldonado [1953] 2 All E. R. 300; Belg. Cass. (March 28, 1952) Revue Critique (1953) 132.

Besides these conflict rules, all the treaties contain provisions on the protection and administration of successions of foreigners.

7. *Recognition of Foreign Judgments.* The Czech-Polish Treaty of 1949 includes the traditional clauses of the Balkan treaties on general recognition and execution of all classes of judgments, subject to examination by the recognizing court, of such matters as the (international) jurisdiction of the decreeing court; service and appearance of the losing party; the application of law in accordance with the conflict rules of the recognizing court; and public policy.[62]

The two Hungarian treaties contain similar provisions for decrees relating to property claims. They apply, however, a different and more liberal system to the recognition of judicial decrees in matters concerning marriage. Foreign judgments on the dissolution, invalidation, existence, or nonexistence of a marriage are recognized, if they comply with only two conditions:[63] one of the spouses must have been a national of the decreeing court when its decision came into force; and the same case must not be *res judicata* as the result of a judgment within the recognizing country. This special régime for decrees relating to marital status is probably also in the Czech-Hungarian Treaty, which does not contain an express provision on the point, strictly limited to the status aspect of the decision.[64]

These provisions greatly improve the national conflict rules of Czechoslovakia and of Hungary, facilitating, in the first country, the otherwise cumbersome procedure for an exequatur to be obtained from the Czech Supreme Court,[65] and abolishing, in the case of Hungary, the claim for exclusive jurisdiction in matters of status of Hungarians,[66] which in general excludes recognition of foreign decrees in matrimonial matters. The rules also represent progress over two of the earlier Balkan treaties providing for jurisdiction only in the national country, now or formerly the same for both spouses, or, as improved, at the former or present common domicil.[67] The latter provision opened up the conflicts question which in the former rule was implicitly answered. At present, a decision in the national country of either of the spouses, wherever his or their domicil or residence, is sure of recognition. The question which law, in case of diversity of citizenship, shall be applied is unanswered. A solution is urgent because the national conflict rules, if a common nationality neither exists nor existed, apply the *lex fori*.[68]

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[62] Czech-Polish Treaty of 1949, arts. 32–41, especially art. 33. Similar rules, except for the applicable law, in treaties Nos. 1, 2, 7, and 8, *supra* n. 5.

[63] Czech-Hungarian Treaty, art. 21 par. 1; Hungarian-Bulgarian Treaty, art. 23 par. 1.

[64] The Hungarian-Bulgarian Treaty, art. 23 par. 4, explicitly so provides.

[65] Czech Code of Civil Procedure (1950), s. 642.

[66] Decree-Law no. 23/1952, s. 15 (a).

[67] Czech-Yugoslovian Treaty of 1923, art. 34 par. 1; Czech-Rumanian Treaty of 1925, art. 19 par. 1.

[68] Czechoslovakia: Law of 1948, s. 18 sentence 3; Bulgaria: Law of 1949, art. 58 sentence 3; Hungarian law does not contain a written rule. According to Torzsay-Biber, "Problems of Private International Law in Matrimonial Actions in Hungarian Courts," 3 Highlights of Current Legislation and Activities in Mid-Europe (1955) 13–24, 23, a Hungarian court would

The Hungarian-Bulgarian treaty, moreover, draws the practical and desirable conclusion from the agreements on the applicable law: all decisions rendered in matters for which uniform conflict rules have been devised shall be recognized without any further condition.[69] This provision which extends in a technically superior form the model incorporated in the older Balkan treaties[70] ensures the practical value of the treaty-made conflict rules to the greatest possible extent. It is surprising that the Czech-Hungarian treaty missed this chance to implement its purposes.

III. Conclusions

The conflict rules of the three East-European treaties, limited to matters of personal status, adhere in this field strictly to the Continental tradition by using a person's national law, not that of his domicil. The principle has even been reinforced by the inclusion of declarations of death of foreign missing persons in certain cases. This reaffirmation of the nationality principle is quite astounding. The uniform social and political philosophy of the contracting states as indicated in the here relevant field by newly enacted statutes on the substantive law of persons and the family, which are inspired by identical leading principles and with only minor deviations in particulars, could have induced quite different expectations. In such a wider community, is not the application of this or that form of socialist law to a comrade of this or that socialist state rather irrelevant? Are these laws not equivalent? Has not, in comparable situations, the supranational community of philosophy of life and law as in South America and in Scandinavia, led to the adoption of the domicil principle? The dissonant answer for the Balkans disregards, moreover, the practical considerations in favor of domicil as the connecting element. The only explanation seems to rest in the theoretical argument that the inviolable "sovereignty" of each socialist state, as stressed in Soviet political theory, demands the application of each country's laws to its nationals. For the choice of nationality as the connecting factor under these circumstances, this is the only apparent specifi-

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apply the domestic law of the spouse residing in Hungary. *Quid juris* if both spouses reside in Hungary?

[69] Hungarian-Bulgarian Treaty, art. 47 par. 1.

[70] The Balkan treaties added a similar provision for each individual subject matter, e.g., Czech-Yugoslav Treaty of 1923, arts. 31 par. 2, 33 par. 2, 34 par. 2; Bulgarian-Rumanian Treaty of 1924, arts. 13 par. 2, 14 par. 3; etc.

The previous Balkan treaties also, though recognizing decisions decreed by virtue of a "transferred" jurisdiction over foreign incapable persons (*supra* p. 489) refused recognition to declarations of death pronounced under a somewhat vague clause over a foreign missing person in disregard of this person's national law (Austro-Polish Treaty of 1924, arts. 26 par. 2, 3; Czech-Polish Treaty of 1925, arts. 11 par. 2, 12; Czech-Rumanian Treaty of 1925, arts. 35 sentence 2, 36). The obligatory application, in these special cases of jurisdiction over a missing foreigner, of the foreigner's national law, as prescribed by the two new Hungarian treaties (*supra* p. 491), justifies recognition of the ensuing decrees in the national country of the missing individual.

cally communist ideological preconception, which, however, decisively shapes the resulting conflict rules.

All three of the postwar treaties are much indebted to the earlier Balkan treaties, the two Hungarian treaties less so than the Czech-Polish Treaty of 1949. The innovations are certainly noteworthy and are definitely improvements: the stating of the rule on capacity for transactions of everyday life; the strict adherence to the personal law for declarations of death, even if pronounced abroad; the extension of the rules on legitimacy to paternity in general, of those on the illegitimate child-father relationship to a general parents-children rule; and the new rule on revocation of adoptions. The lack of a conflicts rule on divorce is regrettable; as a consequence of the extended jurisdiction, this would have seemed to be quite necessary.

As against their respective national conflict rules, the treaties, as might be expected, in general have alleviated references to the *lex fori* that, internationally regarded, appear excessive. This holds true especially of the strongly domestic-minded Hungarian conflict law which only in one instance, namely, that of adoption by a foreigner, succeeded in asserting a claim of state jurisdiction over the person adopted. On the other hand, no one of the national conflict laws seems entitled to superior merit for the improvements achieved in the treaty-made rules.

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DEALINGS BETWEEN DIRECTORS AND THEIR CORPORATIONS IN ARGENTINE AND AMERICAN LAW

THE PROBLEM IN ARGENTINE LAW

The problem of the validity or invalidity of contracts or other transactions between a corporation and one or more of its directors has been dealt with by the courts and the legal writers of the United States with a more realistic approach than in Argentine law. It has appropriately been said that this problem has brought about in Argentina "a contradictory and hesitating doctrine and case law that have disturbed clear vision of the problem, producing doubts as to the conclusions."[1]

The second paragraph of article 338 of the Argentine Commercial Code states that the directors "are prohibited from transacting business or contracting, directly or indirectly, on their own account, with the corporation they manage." This provision was inserted by an amendment to the Code of 1889, with the purpose of protecting the shareholders against the sometimes "despotic

[1] Marcos Satanowsky, Estudios de derecho comercial (Tipográfica Editora Argentina, Buenos Aires, 1950) vol. 1, page 283.

and arbitrary" nature of boards of directors of corporations, who were found to have "handled the investments of the shareholders as if they were exclusively their own."[2] Most of the writers and most of the cases have deemed that the second paragraph of article 338 flatly establishes an absolute disqualification for the directors, a disqualification of "public policy," whose violation can neither be authorized nor ratified by the meeting of shareholders. This view has been accepted, among others, by Rueda,[3] Obarrio,[4] Fernandez,[5] Castillo,[6] Malagarriga,[7] Sasot Betes,[8] and Molina.[9] Rivarola[10] says that "the thinking of the legislator has been rightly interpreted as meaning an absolute disqualification of the directors," but that "the Code should be amended so as to permit the transactions." On the other hand, Siburu[11] and Segovia[12] think that the prohibition of article 338 is just an application of the rules concerning "*mandato*"[13], included in the Civil Code. Malamud[14] states categorically that such prohibition is not one of "public policy," and that if a director deals with the corporation in violation of article 338, the transaction can be ratified by a meeting of the shareholders, with the result that it is rendered valid. Satanowsky[15] reads article 338 together with article 345 of the same Code,[16] reaching the

[2] Report of the "Comision de Códigos de la Cámara de Diputados," Buenos ires, 1889 pages 25/26.

[3] Carlos Rueda, "Compraventa entre sociedades anónimas y sus administradores. Inteligencia de los arts. 338 y 345 del Código de Comercio," published in 113 Gaceta del Foro 79, Buenos Aires.

[4] Manuel Obarrio, Curso de derecho comercial, Buenos Aires, vol. 1, p. 344.

[5] Raymundo L. Fernandez, Código de comercio comentado (Buenos Aires, 1951) I vol. 2, page 511.

[6] Ramón S. Castillo, Curso de derecho comercial, 7th ed. (Buenos Aires, 1951) vol. 3, page 223.

[7] Carlos C. Malagarriga, Tratado elemental de derecho comercial (Tipográfica Editora Argentina, Buenos Aires, 1951) vol. 1, first part, page 481. Malagarriga says that the prohibition of art. 338 does not apply to the contracts entered into "through fixed and preestablished requirements for all," because otherwise, "the director of a corporation engaged in the transportation of passengers by buses could not use its buses".

[8] Miguel A. Sasot Betes, Directores, síndicos, gerentes y fundadores de sociedades anónimas (Buenos Aires, Selección Contable S.A., 2nd. ed., 1953) 81 and 93.

[9] Victor Eduardo Molina, "Naturaleza y alcances de la prohibición contenida en la segunda parte del art. 338 del Cod.de Com.," 11 Revista de la Facultad de Derecho de la Universidad Nacional de Tucumán (1954) 201.

[10] Mario A. Rivarola, Sociedades anónimas (Buenos Aires, 1918) vol. 2, p. 56.

[11] Juan B. Siburu, Comentario del código de comercio argentino (Valerio Abeledo publisher, 3rd. ed., Buenos Aires, 1933) vol. 5, page 135, par. 1290.

[12] Lisandro Segovia, Explicación y crítica del nuevo Código de Comercio de la Republica Argentina (Buenos Aires, 1892) vol. 1, p. 386, par. 1250.

[13] A comparison between "mandato" and "agency" was made in my article "Observaciones sobre el régimen jurídico del mandato (agency) en los Estados Unidos, y su enseñanza," published in Spanish in the Law Review "La Ley" of Buenos Aires, on December 14, 1954.

[14] Jaime Malamud, "Los contratos de los directores con las sociedades anónimas que administran," published in 1950–1 "Jurisprudencia Argentina" pages 49–56 of "Sección Doctrina".

[15] Marcos Satanowsky, *op. cit.*, page 283.

[16] Art. 345 of the Argentine Commercial Code states: "A director who, in a particular

conclusion that "both provisions complement each other and establish a clear principle: the board of directors performs a joint '*mandato*' (joint agency) expressed through the majority of directors met in quorum. When that majority was formed with an interested director, the transaction falls within the prohibition of article 338, while in the contrary situation article 345 governs, that is, the transaction does not fall within the legal prohibition, provided the interested director gives notice of his adverse interest and abstains from participating in any deliberation." Satanowsky states further (page 300) that "the transaction that violates article 338 of the Commercial Code is an absolute nullity, because it establishes a legal prohibition and a legal inability—article 1043 of the Civil Code—and cannot be confirmed—article 1047 of the Code. But an act that cannot be confirmed can, notwithstanding, be ratified. . . . So nothing prevents ratification of the transaction at a meeting of shareholders, with consequent validation." Garo[17] does not believe that the prohibition of article 338 has its origin in public policy, "because public policy is not involved at all," and he also denies that any moral principle is involved in the prohibition of the article, but he concludes (page 442) that "the absolute and peremptory wording of the article precludes the possibility that the meeting of shareholders could deliberate and decide on that subject," and so "the business falling under that prohibition cannot be ratified by the meeting of shareholders."

The decisions of the courts in this matter offer many contradictions in the construction of article 338 of the Code. Thus, a court has declared that the prohibition of article 338 is one of "public policy" whose violation cannot be ratified by the meeting of shareholders, while later the same court has accepted the validity of a contract entered into against the wording of the article, and still later the same court has gone back to its first holding. We shall discuss some of the most important cases in this respect. In *The British Dyewood and Chemical Company* v. *Wilson*,[18] the Commercial Court of Appeals of Buenos Aires said that article 338 establishes a peremptory principle of "public policy," based upon very serious reasons of morality and precaution and that this principle cannot be nullified by the meeting of shareholders. The same court construed this article again in 1921 in *Podesta y Cía.* v. *La Inmobiliaria*,[19] which presented the following facts: the general partnership Podesta y Cía. sued the insurance corporation La Inmobiliaria because the latter refused to pay the fire insurance it had issued on the goods deposited in the warehouse of Podesta y Cía. There had been a fire in certain stacks of wool deposited in the warehouse, and La Inmobiliaria argued that the fire was caused by inherent defect of the wool and other circumstances not within the coverage of the insurance contract.

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transaction has, on his own account or in behalf of another person, an interest adverse to the corporation, must give notice of this fact to the other directors and syndics and must abstain from participating in any deliberation about such transaction."

[17] Francisco J. Garo, Sociedades anónimas (Ediar S.A. publishers, Buenos Aires, 1954) vol. 2, page 441.

[18] "Jurisprudencia de los Tribunales Nacionales," September 1913, p. 401, cited by Satanowsky, p. 292, and by Malagarriga, page 478.

[19] 6 Jurisprudencia Argentina 104, (1921).

La Inmobiliaria further argued that the fire insurance policy was void because Mr. Antonio Podesta was at one and the same time a partner of the general partnership Podesta y Cía. and a member of the board of directors of La Inmobiliaria, and that the contract was therefore invalidated by article 338 of the Code. In discussing this point, the Court said that "the prohibition of the second part of article 338 cannot be applied to contracts or dealings in the regular line of business of a corporation, because otherwise, the scope of action of a corporation would be reduced causing it damage, and because in that case article 345 would not have any practical application." The Court further stated that as a partner in Podesta y Cía., Mr. Podesta "did not have an adverse interest to that of the insurance corporation," since the contract accorded with the interests of both parties. The Court concluded that no legal or ethical principle had been violated. Three years later, the same Court in *Sociedad Delta del Parana* v. *Lizarrague y otros* [20] applied article 338 rigidly and denied validity to a loan made by a director to his corporation, on the grounds that article 338 stated a prohibition of "public policy" which could not be waived or ignored by the meeting of shareholders. This seems to be also the view of the *Inspección General de Justicia* of Argentina, an office of the Ministry of Justice with regulatory jurisdiction over corporations; this office has taken the view that loans of directors to their corporations, even when made to help the corporations in a difficult situation, are within the prohibition of article 338.[21]

Another pertinent case was *Sociedad de Estancias e Industrias Argentinas S.A.* v. *Kade, Clara Kade de*,[22] in which the facts were as follows: Clara Kade de Kade, whose husband, Mr. Federico Kade, was a director of the plaintiff corporation, loaned that corporation 130,000 pesos, and received as security a mortgage on certain property of the corporation. The director, Mr. Kade, notified the board of directors of his wife's interest in the transaction, and abstained from voting. Later the corporation sued Mrs. Kade to establish the nullity of the mortgage, and to recover from her all the sums of money she had received in payment of interest. The trial court held that the loan was void in all respects that made it onerous for the corporation, that Mrs. Clara Kade de Kade should return all the interest she had received, annulled the mortgage, and declared that the corporation was accordingly under a legal obligation to return the principal sum. The Second Court of Civil Appeals of Buenos Aires, confirming the decision of the trial court, said that the prohibition of article 338 was one of "public policy" and that its violation therefore could not be legally overcome by the ratification of the shareholders. The Court of Appeals added that this solution could not be changed because the loan was made by the wife of a director rather than by a director himself since the prohibition of article 338 extends to transactions made "indirectly" between a director and his corporation, and because under the principles of community property in

[20] 13 Jurisprudencia Argentina 550, (1924).

[21] See Miguel A. Sasot Betes, *op. cit.*, p. 83 and footnotes 14 and 15.

[22] 68 Jurisprudencia Argentina 126, 15 La Ley 340, (1939).

force in Argentina Mr. Kade derived benefit from the mortgage. The Court did not analyze the fairness of the mortgage itself, nor the question of actual benefit or damage to the corporation occasioned by the transaction.

The effects of a drastic application of the prohibition of the second part of article 338 seem to have been reduced in later cases. Thus in 1946, in *Zaraguela Gaspar Jose Luis* v. *Kaplan Elias*[23] the First Court of Civil Appeals of Buenos Aires said that the prohibition of article 338 is not applicable when the contract has been motivated, not by a conflict of interests, but by a community of interests, stating that in such situations there are not involved the serious issues of morality and precaution that were the grounds for that provision. The Commercial Court of Appeals of Buenos Aires said in 1954, in *Manufactura Forti Argentina S.A.* v. *Lascombes Daniel P.*[24] that a director can enter into a contract with his corporation if he complies with the requirements of article 345 of the Commercial Code (that is, if he gives notice of his adverse interest to the other directors and abstains from participating in the discussions); the Court quoted Satanowsky, and does not appear to have conducted an independent investigation of the problem.

Such is the present state of the judicial and scholarly opinion in Argentina in this matter. The related problem of transactions between corporations having interlocking directorates has not been discussed in Argentine corporation law, and is not specifically dealt with by Argentine statutes.

The Problem in American Law

In the United States, the problem of the validity of the transactions between a director and his corporation has been influenced in general by the predominant idea that the policy of facilitating business must prevail over the drastic policy of disqualification established by the British cases. In English law, the judicial decisions have adopted a rule of "uncompromising rigidity," according to which any contract entered into between a director and his corporation is voidable at the election of the corporation, regardless of whether or not it is fair or honest, if the option be exercised by the corporation within a reasonable time, and before ratification by the shareholders.[25] Section 199 of the English Companies Act of 1948 provides that a director is under a duty to give notice of his adverse interest and is bound to pay a fine up to 100 pounds if he does not do so. Besides, article 84, A, First Part, First Schedule, of the Act of 1948, states that directors shall abstain from voting in any transaction in which they

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[23] 1946-II-Jurisprudencia Argentina-766, (1946).

[24] 75 La Ley 439 (annotated: "La prohibición del art. 338 del Cód. de Comercio") 1954-III-Jurisprudencia Argentina-391, (1954); this case was analyzed in the article, "Los contratos entre una sociedad anónima y sus directores en el derecho argentino," by Carlos R.S. Alconada Aramburu, published in the Law Review "La Ley" of Buenos Aires, on February 29, 1956.

[25] Henry W. Ballantine, Corporations (Callaghan and Company, revised ed., Chicago, 1946) page 170.

have an adverse interest, and if they vote, their vote shall not be counted.[26] In English practice, the problem of dealings between a director and his corporation is now usually dealt with, apparently without judicial objection, in the company's articles (by-laws), where these contracts are generally permitted subject to some limitations.[27] In the United States, directors come under less strict rules of fiduciary limitation toward their corporate principal than trustees or agents in general, on grounds of practical policy in the convenient management of corporate business.[28] For example, it has been recognized that to prohibit loans made by a director to his corporation would mean to deny to the corporation the financial help of those who are principally interested in its success. Thus, in *Twin Lick Oil Company* v. *Marbury*[29] the Supreme Court said that a director is not prohibited from loaning money to the corporation when it is needed for its benefit and the transaction is open and otherwise free from blame.

In the United States, the cases that have dealt with this problem have distinguished the following types of transactions:

(a) *Contracts with an interested director authorized by a sufficient independent majority without his presence or vote.* Only a few American courts have adopted the English rule quoted above. Most of the courts have thought that the contract is not voidable *per se*, if there is a disinterested quorum and voting majority and if the director successfully bears the burden of showing the fairness of the transaction.[30]

(b) *Contracts authorized on behalf of the corporation in part by the interested director's vote, or by the vote of an independent majority in situations where a requisite quorum would be lacking if the interested director were not deemed present.* Many authorities hold such contracts to be voidable at the option of the corporation, even though the contracts might have been fair when made.[31]

(c) *Some courts have adopted a liberal rule, according to which a showing of fairness is the only limitation in any case.* The objective of the fairness test is to determine on the facts of each case whether the directors have exercised the business judgment which their duty to the corporation requires.[32]

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[26] About the English law on this point, see: Halsbury, The laws of England (Butterworth and Co. Ltd., Lord Simonds editor-in-chief, London, 1954, 3rd. ed.) vol. 6, pages 301, 302, and 321 and cases there quoted; also Halsbury's Statutes of England (Butterworth and Co. Ltd., Sir Ronald Burrows, K.C., editor-in-chief, Bell Yard Temple Bar, London, 1949) 2nd. ed., vol. 3, pages 618 and 813; also A. B. Levy, Private corporations and their control, (Routledge and Kegan Paul Limited, London, 1950) vol. 2, pages 708 through 716; also L. C. B. Gower, The principles of modern company law (Stevens and Sons Limited, London, 1954) 136 *et seq.*

[27] Ballantine, *op. cit.*, page 171.

[28] Henry W. Ballantine, Norman D. Lattin and Richard D. Jennings, Cases and materials on corporations (Callaghan and company, Chicago, second ed., 1953) pages 293, 294.

[29] 91 U.S. 587, (1875).

[30] Ballantine, Lattin and Jennings, *op. cit.*, page 294.

[31] Ballantine, *op. cit.*, p. 172, 173.

[32] Note: "The fairness test of corporate contracts with interested directors," 61 Harvard Law Review (1948) 335.

(d) In cases of interlocking directorates, most of the courts follow the rule adopted by the federal courts, according to which contracts entered into by two or more corporations through interlocking directors will be upheld if fair and reasonable, even when the majority or all of the directors are common to the corporations.[33]

In the United States, it has become customary to insert in the articles of incorporation or by-laws a special provision permitting contracts between a director and his corporation or between corporations having interlocking directors. But the law is not clearly established as to the legal effect to be given to such clauses. Stevens[34] thinks that it may reasonably be assumed that clauses of this character "will be regarded as contrary to good public policy and void to the extent that they were intended to exonerate directors from flagrant violations of their fiduciary obligations." Some cases have construed such clauses as shifting the burden of proof on the question of fairness from the director or the one claiming under the contract to the complainant.[35]

Some state legislatures have attempted to deal with these problems. It has been said that the statutes "fall into three types: the first provides procedure whereby shareholders, officers, and certain public officials may bring suits to correct the wrongs of directors; the second type deals with special kinds of corporations; the third type deals with the problem as a matter of general corporation law."[36] Among this third type of statute we find provisions as to this matter in: c. 116, sec. 21, of the Rhode Island General Laws (1938);[37] sec. 820 of the California Corporations Code (1947);[38] sec. 3081 of the West Virginia Code Annotated (1955); sec. 5827 of the Vermont Public Laws (1933).

Besides, there are a number of important federal statutes forbidding or regulating interlocking directorates in certain types of corporations: thus, 15 U.S.C.A. 19 prohibits interlocking directorates in banks which are members of the Federal Reserve System, subject to certain exceptions; 12 U.S.C.A. 78 prohibits directors and others connected with investment banking corporations from serving as officers, directors, or employees of banks which are members of the Federal Reserve System; 49 U.S.C.A. 20a(12) makes it unlawful for any person to hold the position of officer or director of more than one carrier which is subject to the Interstate Commerce Act, unless such holding is authorized by the Interstate Commerce Commission upon due showing that neither public

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[33] Ballantine, Lattin and Jennings, *op. cit.*, p. 296 and footnotes to that page.

[34] Robert S. Stevens, Handbook on the law of private corporations (Hornbook Series, West Publishing Co., St. Paul, Minnesota, second edition, 1949) 689.

[35] Ballantine, Lattin and Jennings, *op. cit.*, p. 300 and footnotes 2, 3.

[36] Kenneth B. Lane, note: "Statutory regulation of dealings between corporations with interlocking directorates," 23 Cornell Law Quarterly (1938) 445, analyzes these three types of statutes.

[37] This provision was construed in Duncan Shaw Corp. v. Standard Machinery Corp., 196 F. 2nd. 147 (1952).

[38] This provision was construed in Remillard Brick Co. v. Remillard Dandini Co., 241 P.2nd. 66 (1952); this case was noted in "Effect of statutes on contracts between corporations with common directors," 51 Michigan Law Review (1953) 705.

nor private interests will be adversely affected thereby; 15 U.S.C.A. 19(7) makes it unlawful for any person to be director of two or more corporations, other than banks or railroads, any one of which has a capital and surplus of over $1,000,000, if the two corporations are competitors so that the elimination of competition between them by agreement would violate the antitrust laws[39]; etc.

Conclusions

From all that has been said, it can be easily asserted that the law of the United States on this point has been flexible enough to permit contracts between a director and his corporation or between two corporations with interlocking directors and, at the same time, to protect the rights of the shareholders and of the corporation. It is my opinion that transactions between a director and his corporation could properly be validated in Argentine law in situations where the director gives notice of his adverse interest and abstains from voting or forming the quorum and where the disinterested directors and the shareholders authorize or ratify the contract. It is difficult to see what principles of morality or of public policy would be subverted if these legal requirements are satisfied. And so it is my opinion that the second paragraph of article 338 of Argentine Commercial Code should be amended, and this amendment should be in effect a fusion of articles 338 and 345, expressly permitting the previous authorization of such contracts, or their subsequent ratification. As such transactions should not be normally too numerous, the imposition of certain legal requirements for their validity will not hinder the regular business of a corporation. Argentine legal scholars should take some ideas and suggestions from the rules formulated on this point in American law, to amend the Commercial Code and to promote this aspect of the life of the Argentine corporations.

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[39] In the note: "Interlocking directorates: a study in desultory regulation," 29 Indiana Law Journal (1954) 429, there is a comment on the case U.S. v. W. T. Grant (345 U.S. 629) that dealt with this section of the Clayton Act.

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DECISIONS

France: Monetary Clauses in International Contracts—The end of the First World War was the time at which the nominalistic theory of money saw its triumph in France. Having lost its convertibility, the bank-note had, on the other hand, become the only legal tender: thus it became the universal means of payment and was obligatorily accepted on the same basis as gold. It

replaced gold even in those cases in which payment in gold had been specifically provided for in contracts. The monetary unit, consistently equal to itself, despite the reduction of its purchasing power, served both as the means of payment and as the measure of value.[1] If we attempt to find a definition of the "*cours forcé*" of the franc, as applied by the French courts, the merging of these two functions of money is the outstanding feature.

However, from the very beginning, the nominalistic theory was limited to domestic transactions. As early as 1920, the Court of Cassation denied the application of the rule of "*cours forcé*" to dealings with foreign countries.[2] Through all the various reasons invoked until the theory of the "international contract" was definitely formulated in 1927 by Attorney of State, Paul Matter,[3] the courts had consistently applied the dual conception, thus opposing the domestic system to the international system. The innovation introduced by the new theory lies in its "economic" criteria: a contract is to be considered as international only when it involves an "international payment," i.e. entailing a double transfer of goods or moneys from a foreign country to France, a "flow back and forth" across the frontier.[4]

With the perspective acquired during the last thirty years, the question arises whether the economic criteria are satisfactory and also whether they are still valid under the new circumstances which are the consequence, in particular, of the instituting of exchange control and control of foreign trade, the effect of which is to place international contracts under the control of the administrative authorities.

This is the question with which the Paris Court was faced in the matter decided in the judgment of December 1955.[5] This decision may prove to be significant.

The opposition of two legal systems, one governing domestic transactions and the other international transactions, is one of the principal features of French international private law; and therefore, the French concept differs from the American system, the theory of proper law, as well as the other rules of conflict. The present trend of the French courts is to apply the theory of localization.[6]

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[1] It was only by the expedient of the purchasing power clause (clause échelle mobile) that the parties to a domestic contract could counteract the effects of a possible monetary depreciation. See: Planiol, Ripert et Radouant, Traité de droit civil, (2ème éd.) p. 580; Cass. civ. Nov. 3, 1953, J.C.P. 1953. 7840; App. Paris, March 22, 1955, Gaz. Pal. 1955.427; App. Aix en Provence, Déc. 13. 1955, Gaz. Pal. 1956.1.172.

[2] Cass. req., June 7, 1920, Clunet 1920.654.

[3] Cass. May 17, 1927, Dalloz 1928.1.25.

[4] Planiol, Ripert et Radouant, Traité de droit civil, n° 1192, 1194; Arthur Nussbaum, Money in the Law—National and International (2nd ed.), p. 262.

[5] Gaz. Pal. 1956.1.228.

[6] Cass. civ., Apr 24, 1952, Revue Critique de droit international privé, 1952.1.185; Clunet 1952.1228; Sirey, 1952. 1. 185; J.C.P. 1952. II. 7140. *Cf.*, on Dutch theory of international contract: F. Donker Curtius, "Les caractères de droit public des législations abrogatives des clauses-or," Clunet, 1939, 32; J. Offerhaus in Netherland's Review of International Law, 1953,33.

What is then the basis for the special rules French law applies to monetary clauses? This is the problem discussed below.

There have been some criticisms of the French monetary theory, which has been suspected of being nationalistic and utilitarian.[7] Actually, during the last few years, this concept has made it possible to protect the rights of foreign creditors affected by the depreciation of the franc, as the French debtors were obliged to make their payments on the basis of the *gold value* of the monetary unit specified in the contract.

The main feature of the French theory is that the parties to an international contract are at liberty to express their obligations in terms of currency (or gold) without being affected by the law governing the agreement. In other words, the intention expressed in the contract takes precedence over the law governing the contract, insofar at least as monetary clauses are concerned. The nominalistic principle does therefore not apply to international contracts.

Thus, for instance, in the case of a loan issued in Canada by a French steamship company, Compagnie des Messageries Maritimes, and expressly subject to the law of the place of issuance, the French courts denied the application of Canadian law (and Canadian gold clause abrogation) and recognized the validity of the above clause.

What is the doctrinal justification of the French rule? An analysis of the decisions of the three courts which successively adjudicated this case, instituted by the bondholders of "Compagnie des Messageries Maritimes," shows the evolution of the theory. In order to deny the application of Canadian law, the Tribunal Civil de la Seine invoked the principle of territoriality according to which a foreign public law is only effective within the state which promulgated it, whereas, outside its frontiers, the law governing the obligation takes precedence.[8] This concept, criticized by various authors,[9] who objected that it confused the law of contract with the law of the place of performance, was abandoned by the French courts. Two years later, the Court of Appeals in upholding the judgment of the Tribunal de la Seine, based its decision on quite different grounds.[10] It stated that the parties to an international contract may endow it with its own status, which is not necessarily linked to a national legal system; this was actually a return to the old principle of *autonomie de la volonté* as formulated in 1525 by Dumoulin,[11] and which still appears to have retained

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[7] Nussbaum, *op. cit.*, p. 267.

[8] Nov. 16, 1938, Gaz. Pal. 1938.2.727; See, Arminjon, "Les lois politiques en droit international privé," Revue de droit international privé, 1930, p. 385; Précis de droit international commércial (3ème éd.), p. 249.

[9] Hamel, "L'application des lois monétaires annulant la clause-or et les principes de conflits de lois," Nouvelle Revue de droit international (1937) 499; A. Mestre, "Les lois étrangères sur les clauses-or devant les tribunaux français," Gaz. Pal. 1938.2.25; Niboyet, Traité de droit international privé, t. IV, n° 1103, p. 13; Nussbaum, *op. cit.*, p. 268.

[10] App. Paris, Apr. 24, 1940, Sirey, 1942.2.29; Revue Critique de droit international privé, (1946) 82.

[11] A. Pillet, Traité pratique de droit international privé, t. II, p. 150.

some partisans in France.[12] But nonetheless this position no longer corresponds to the prevailing trend in French practice.

In 1950, the Court of Cassation decided that an "international contract is necessarily subject to the law of a state," and therefore the only means of denying the application of the law of the contract was to invoke the idea of public policy (*ordre public*).[13]

To sum up, the French principle as regards monetary clauses in international contracts thus appears to supplant the rule of conflict. Is this because here we are concerned with a provision of French domestic law regarding monetary clauses in foreign contracts?[14] Or is it a fundamental concept of the international law of contracts, stressing the special nature of a "*vinculum juris*" created in international trade,[15] a sort of reaction against the nationalistic trends which consider private international law as a branch of domestic law? Although it is tempting to accept this last explanation, it is difficult to understand that it would apply only to monetary clauses, but this is the case in present practice.

But what are the characteristics which distinguish an "international agreement" from a domestic agreement? We will briefly review the definition of the international agreement: it is certainly the element best known, though perhaps not the most satisfactory, of French doctrine.

The criteria are not legal but economic.[16] What is, however, the exact significance of the "flow back and forth"? The author of this expression, Attorney of State Matter, merely cited some examples and did not give a definition. In an annotation, Professor Niboyet expressed the view that the criteria were represented by the place in which the object of the contract was located: if its object was located outside France the contract was international.[17] This is of course true in the case of an import contract, but it is no longer true in the case of an export contract. But in any case, these criteria do not apply in financial transactions; and these have given rise to the greatest number of disputes and have raised the principal difficulties. Thus, precedent has refused to admit the international character of loans made to French debtors by foreign creditors when the funds loaned were located in France.[18] But other decisions had recognized the international character of loans issued in France when the funds were used in foreign countries.[19]

[12] See: P. Keyser, "L'autonomie de la volonté dans la jurisprudence française," Clunet 1931, 32; Cass. req. Oct. 19, 1938, Revue Critique de droit international privé, (1939) 127.

[13] Cass. civ., June 21, 1950, Clunet 1950, 1196; Revue Critique de droit international privé, (1950) 609.

[14] Batiffol, Traité de droit international privé (2ème éd.) n° 628, p. 675.

[15] P. Lerebours Pigeonnière, "A propos du contrat international," Clunet, 1951, 4. See a remarkable outline of the evolution of Private International Law in France during the last 50 years: Ph. Francescakis, in Revue Internationale de Droit Comparé, 1955, 349.

[16] Cass. civ. January 1934 and February 14, 1934, Dalloz 1934. 1.73; March 10, 1942, Gaz. Pal., 1942.1.240.

[17] Sirey, 1946.1.17.

[18] Cass. civ. Nov 2, 1932, Clunet, 1933, 1197. Cass. req. February 14, 1938, Sirey, 1939.1.57.

[19] For instance, Cass. civ., July 7, 1931, Clunet, 1932. 403.

It appears that the uncertainty arises particularly from the fact that the concept of "reciprocal movement" does not reflect the actual facts.

International financial settlements are operated without actually transferring funds, through a process of compensation, and shipments of gold are made only rarely to balance accounts. In fact, the transfers of funds are simply carried out by a system of accounting.

Obviously, settlements with foreign countries result in the increase or the decrease of the credit balance of one country in its account with another country. But if these were the real criteria of an international transaction, any operation which results in a resident's becoming either the creditor or the debtor in a foreign country, would necessarily affect the balance of accounts of his country, and should be considered an international transaction.

In this event, any contract entered into by parties residing in different countries should be considered as an international contract and therefore the economic criteria would not correspond to the facts.

It is clear that funds deposited by a foreigner in a bank in France affect the French national balance of accounts in respect to foreign countries, and that a transaction carried out with these funds between parties residing in France and outside France would necessarily modify this balance, and should therefore be considered as an international transaction.

But time and new conditions were necessary for these simple ideas to become apparent.

Exchange control, instituted in France by the Decree of September 9, 1939, and perhaps even to a greater extent the new regulations relating to foreign trade, resulted in a complete change in the relationship with foreign countries.[20]

At present, commercial transactions with and payments to foreign countries are subject to authorization by the Government; the agreements between residents and nonresidents are in most cases subject to the same authorization and said authorization has become an inherent part of the validity of the contracts, and noncompliance with it results in nullity. Also, the whole field of private relationships with foreign countries is now within governmental control and subject to a new branch of economic administrative law.[21]

The system of law concerning international relations has thus been pro-

[20] Le contrôle des changes. Etude de droit comparé publiée sous la direction de M. Hamel, Paris, 1955. (21) App. Lyon, July 1, 1946, Moniteur Judiciaire de Lyon, 1947, 398. App. Madagascar, March 17, 1948, Revue Juridique et Politique de l'Union Française 1948, 503. App. Douai, February 23, 1951 (unpublished) Tribunal Seine, March 14, 1949, J.C.P. 1949. II.5038. App. Aix-en-Provence, Dec. 21, 1953 (unpublished). App. Douai, July 8, 1954, Revue Critique de droit international privé, 1955. 165, Roblot, "La répercussion de la règlementation des changes sur la formation et l'exécution des obligations," Droit Social, Mars 1954.

[21] L. Anselme-Rabinovitch, "La règlementation des changes et son influence sur les contrats internationaux," Gaz. Pal. 1955.I (Doctrine), p. 57; "La règlementation des changes en droit français et en droit international et le statut du Fonds Monétaire International," Revue de la Banque (Bruxelles) (1955) 317.

foundly affected by this new development. The *Office des Changes* (Exchange Control Office) can authorize clauses providing for payment in foreign moneys in transactions which do not correspond to the traditional definition of "international contract" and the courts have been led to recognize the validity of such clauses.[22] On the other hand, the administrative authorities have the possibility, even when, according to the rule of precedent, clauses providing for foreign currency would be valid, to refuse authorization insofar as the performance of the agreement is concerned.

However, no formal legal provision has abrogated the legislative texts concerning international payment, and one could cite several decisions which apply, as in the past, this principle, in general however in litigation arising prior to the instituting of exchange control in France. In some cases, it has become apparent that rules which are more or less parallel apply to the same matter, some originating in monetary law, and others in exchange control regulations.[23] But, to our knowledge, this is the first time that, in order to set aside the traditional criteria of international contract concerning the validity of a gold clause, a court based its decision on exchange control regulations.[24]

In the case decided by the Court, a creditor domiciled in a foreign country made a loan to a French debtor. This loan was payable in gold pounds sterling and the validity of the gold clause was contested. If the Court had wished to apply the traditional criteria, the economic nature of the transaction, and especially whether the funds lent had been transferred to France from the foreign country, would have had to be determined. The Court rendered its judgment in favor of the creditor, basing its decision merely on the fact that the lender as well as the partial assignee of the claim were established in a foreign country. It appears therefore that the Court considered the contract international by the mere fact that the parties to it were located in different countries, thus renouncing the previous requirement of a double transfer of goods or funds.

Thus, it seems that in the opinion of the Court, any contract entered into by a resident with a nonresident is *eo ipso* an international contract, and that the parties are free to express their obligation in such a contract in gold or in foreign currency, provided they comply with exchange control regulations.

Incidentally, one of the grounds of the decision calls for a comment. The Court declares that the loan had been agreed to in gold as a consequence of the domicile of the lender and not to avoid the depreciation of the franc. It is submitted that this ground is open to criticism. Whereas, in domestic transactions, an agreement intended to protect the parties against a devaluation of the franc is null and void, this rule is not applicable to international contracts. But did the Court wish to go further and say that the domestic system is from now on the

[22] App. Colmar, May 28, 1952. Revue Critique de droit international privé, 1952.726.

[23] Annotation by J. Ph. L., J.C.P. 1949.II.5038.

[24] L. Anselme-Rabinovitch, "Vers une définition nouvelle du contrat international," Gaz. Pal. 1956. 1. (Doctrine) 37.

only one applicable to all contracts, irrespective of whether they are domestic contracts or international contracts? This seems unlikely as it would mean the reversal of the French theory of international contract.

By imposing special rules with respect to financial transactions with foreign countries, exchange control regulations have modified the conditions of performance of international contracts.

All payments between residents and nonresidents, even on French territory, must be effected through authorized banks and cash payments are prohibited, the only exception being payments for "living expenses" made by nonresidents in France.[25] When an amount due to a creditor residing abroad is expressed in foreign currency, the resident debtor pays into the authorized bank the amount necessary to purchase that currency on the official market (there are two markets: one called "free market" for convertible currencies and another one, called "official" for all other currencies, but in fact both are under government control); when a resident is to collect abroad a debt in foreign currency, he assigns this sum to the *Office des Changes* and is credited with the countervalue thereof at the official rate.

We have already mentioned that an international contract—to the extent that the traditional criteria discussed above are still applicable—is not necessarily a transaction involving a payment made or received abroad. The sole fact that the agreement is connected with an international transaction (as defined by precedent) qualifies it as such even though it is entered into between parties residing in France and its performance is to take place on French territory; in this case the clauses providing for payment in foreign currency or in gold are valid[26] but, insofar as the foreign currency is concerned, the amount due must be converted into francs at the official rate, as a general rule, on the day of actual payment.[27] Under the Law of February 8, 1941, s. 9, a French debtor of a debt expressed in a currency other than francs may pay his French creditor in francs, at the official rate at the due date. However the Court of Cassation decided that this rule is not applicable to obligations resulting from international contracts, and that it cannot alter "the substance of the obligation."[28] As, on the one hand, the stipulations in foreign currency or in gold are permitted only in international contracts and as, on the other hand, the application of the rule is barred from the field of international contracts, it is doubtful to what transactions it does still apply.

A distinction is generally made between "gold clauses" providing for pay-

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[25] L. Anselme Rabinovitch, "Le nouveau régime de paiements dans la zone francs et ses répercussions sur l'exécution des contrats," Journal des Notaires, 1955, 177.

[26] Cass. civ. Apr. 18, 1931; Cass. req. June 29, 1931, Sirey 1933.1.297 annotated by Prof. Niboyet; Dalloz 1931.1.137 annotated by Prof. Savatier. Also: Cass. req. Oct. 27 and Nov. 27, 1943, Sirey 1946.1.17 annoteted by Prof. Niboyet.

[27] Appeal Paris Dec. 22, 1951 Revue Critique de Droit International Privé, (1953) p. 376 annotated by Prof. Loussouarn.

[28] Cass. civ. January 24, 1956 Dalloz et Sirey 1956.317 annotated by Mr. Lenoan.

ment in gold and "gold value clauses" which are actually monetary obligations, the amount varying according to the fluctuation in the price of gold.[29]

However, French courts seem to consider that in both cases the obligation of the debtor exists in gold itself and not in money. For instance, in deciding against the application of the law of February 8, 1941, in favor of bondholders, the Court of Cassation says that "the operation of conversion into francs which represent the countervalue of a certain quantity of gold which already is the property of the bearers of bonds, is outside the field of application of s. 9 of the law of 1941."[30]

A recent judgment of the Paris Court of Appeals deals with the same matter. The Court decided that a French debtor who promised to pay "gold pounds sterling" to his foreign creditor must either remit to the latter gold coins or pay the countervalue thereof at the rate of the "free market."[31]

The Law of February 2, 1948, which established the "free market of gold" (*marché libre de l'or*) authorizes transactions in gold both for residents and for nonresidents; on the other hand, exportation and importation of gold are prohibited and can only be effected pursuant to the granting of a license delivered by the Banque de France. Does this mean that a resident can pay his foreign creditor in gold? Insofar as the payment is made between a resident and a nonresident, it seems that the regulations relating to exchange control are applicable and such payment requires a special permit from the exchange control authorities, since its effect is to discharge a debt due to a nonresident creditor.

There is another question which is raised by the performance of the liabilities expressed in gold: the rate at which the conversion of gold into francs is to take place. The abovementioned decision of the Paris Court applied the rate of the "free market" for gold. Apparently, the judgment is based on domestic law, since evidently the court was not called upon to consider the international aspect of the matter. We refer to the provisions of Article IV of the Bretton Woods Agreement providing that the "par value" of the currencies of member States should be expressed in gold or in terms of United States dollars, the effect of which is to establish a fixed ratio between these currencies and gold.[32]

It is submitted that the domestic regime and the provisions of the international Agreement reveal some contradictory aspects, and in a similar situation, the Cour d'Appel Mixte d'Alexandrie, in converting into Egyptian currency obligations expressed in French gold francs, applied, instead of the rate of the "free market," the parity resulting from the Bretton Woods agreement.[33]

[29] F. A. Mann, The legal aspects of money (2nd ed) p. 113, Nussbaum, *op. cit.* p. 223.

[30] *Cf.* n. 28 *supra.*

[31] *Cf.* for an abstract of the judgment, Gazette du Palais 1956.2. Sommaire, v°. Paiement; also, L. Anselme-Rabinovitch, "De l'exécution en France des obligations internationales libellées en or," Gaz. Pal. November 6, 1956, 4.

[32] Arthur Nussbaum, "The legal status of gold," 3 Am. Journal of Comparative Law, (1954) 360.

[33] Journal des Tribunaux Mixtes n° 3772 (May 26 & 27, 1947) and April 14, 1949; *ibid.* n° 4078 (May 23 & 24 1949).

It is true that since then the International Monetary Fund issued a statement which could be interpreted as recognizing the power of the member states to determine the domestic regime relating to transactions in gold, which would entail the separating of the two regimes, the domestic and the international.[34] It must also be noted that France no longer communicates the "par value" of gold in francs to the International Monetary Fund, so that the only index reference that remains would appear to be the rate of the "free market." But, on the other hand, there has been no modification of the "par value" of the franc, as previously fixed.

It would thus appear that the determining of the rate of the conversion into francs of obligations expressed in gold, insofar as international transactions are concerned, would give rise to most difficult problems and would primarily depend on the interpretation by the Monetary Fund of the provisions of Article IV of its Agreement in the light of the abovementioned statement.

The International Monetary Fund has already made use of such interpretation, under Article XVIII of the Agreement,[35] and it is submitted that such action, in the event the Monetary Fund so determines, should have the value of an administrative interpretation of international treaties, favored by French practice.[36]

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[34] International Monetary Fund, Annual Report, 1952, ann. IV.

[35] André van Campenhout, "International Monetary Fund Agreement and Foreign Exchange Control," 2 Am. Journ. of Comp. Law (1953) 389. For full bibliography on this question, see J. Gold, International Monetary Fund, Staff Papers, Vol. IV (1955) n° 1.

[36] Cass. crim. March 24, 1953, JCP.1953.II.7659; Cass. soc. Jan. 19, 1954 JCP II 8152; Cass. comm. May 9, 1955 JCP.1956.II.9177; Cass. civ. June 4, 1955 J.C.P.1955.II.8777; See, Ch. Rousseau, Droit International Public, p. 49; Batiffol, *op. cit.* n° 38, p. 39 and n° 41, p. 45.

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MONEY OF REFERENCE AND CONVERSION OF FOREIGN MONEY:—The arbitral award in *The Government of Greece v. The Government of the United Kingdom*[1] rendered on June 10, 1955, by M. René Cassin, Vice-President of the *Conseil d'Etat*, professor at the Faculté de Droit of the Paris University, touches upon fundamental and unsettled issues of monetary law. The rules of conversion of sums expressed in one monetary system into another money, developed in the horse-and-buggy age; the new rules crystallize but slowly—we are, indeed "wandering between two worlds, one dead, the other powerless to be born."[2] The weight of a decision in an international case so much in the public limelight,

[1] The Royal Government of Greece v. The Government of H.B.M. in the United Kingdom. The full text of the Arbitral Award is reproduced in 45 Revue Critique de Droit International, Privé (1956) at pp. 278 *et seq.* A copious extract can be found in Revue de l'Arbitrage (issue No. 1, 1956) at p. 15.

[2] Matthew Arnold, Stanzas from the Grande Chartereuse.

settling a delicate issue, is indeed great. Since very strong arguments can be brought up that lead to a result different from that of the award, the criticism should be as vociferous as respect for the prestige and the outstanding learning of the arbitrator permits.

I. The Facts

At the beginning of World War II, cargoes destined to Greek ports were diverted to the Middle East to prevent capture by the forces occupying Greece. The cargoes belonged partly to the Greek Government, partly to private Greek importers. On February 11, 1942, an agreement was reached between the two governments on the basis of which the British took possession of these cargoes. The first part of the agreement (Section "A") dealt with cargoes that belonged to the Greek Government itself. It was stipulated that any cargo or part thereof was to be delivered to the Greek Government upon its request; goods not so requested were to be used by the British for the best interest of the Allied war efforts. The Greek Government was to be credited for these latter cargoes "on the basis of the f.o.b. cost of the merchandise, plus a sum equal to the cost of marine insurance on the London Market and of the war risk insurance charged by the Agency appointed by the Ministry of War Transportation."[3]

The second part (Section "B") of the agreement dealt with cargoes other than those belonging to the Greek Government. The British Government was to take possession also of these shipments, but here again any cargo demanded by the Greek Government was to be delivered to it in Egypt; the remainder was to be used by the British in the best interest of the common war effort, except that cargoes not requisitioned by the Greek Government, or not needed for the war effort, could be returned to private claimants at the discretion of the British agencies. The Ministry of War Transportation was to examine all claims made by private owners of cargoes within six months from the date of requisitioning or taking into possession; after the expiration of these six months, the Ministry of War Transportation, or other competent agency, was to credit the Greek Government "with the f.o.b. cost of the requisitioned cargo as well as with a sum equal to the cost of marine and war insurance."[4] The Greek Government was to hold the British Government harmless against claims of private cargo owners.

In the third part (Section "C") of the agreement it was stipulated that "financial measures concerning the credit which is to be entered in conformity with the provisions of Sections 'A' and 'B' of the Agreement shall be the subject of subsequent negotiations between the British and Greek Govern-

[3] "... le Gouvernement hellénique serait crédité pour les cargaisons ... sur la base du coût f.o.b. des marchandises, plus une somme égale au coût de l'assurance maritime sur le marché de Londres et de l'assurance des risques de guerre auprès de l'Office qualifié du Ministère des Transports de Guerre, à concurrence d'une valeur n'excédant pas le coût f.o.b. de ces cargaisons ..."

[4] "... créditera le Gouvernement hellénique du coût f.o.b. de la cargaison réquisitionnée, ..."

ments."[5] Beginning with the end of the War, negotiations were carried on between the two governments as to the amount which was to be credited to Greece. On September 18, 1949, before an agreement was reached, the rate of exchange of the pound sterling in terms of the dollar was decreased from 4.03 (which was the rate throughout the war) to 2.80.

The cargoes in dispute were purchased in the United States for dollars.

II. The Issue and the Decision

The sole issue submitted to the arbiter was to determine whether the amount in pounds sterling with which the Greek Government is to be credited concerning the cargoes shipped from America, the original f.o.b. price of which was in dollars, and which were taken into possession by the Government of H.B.M. of the United Kingdom, should be established by applying the rate in force prior to September 18, 1949, or the rate in force on the "date of payment" [sic].

The arbiter's decision was as follows:

1. The agreement dated February 11, 1942 created between the High Contracting Parties an account in a single money;

2. The dollar was not adopted as "money of the contract" [sic], i.e. to be paid in kind, for any of the cargoes. Even for those which were acquired f.o.b. United States, and paid for in dollars, the British Government promised to credit the Greek Government in pounds sterling with the exclusion of any other money;[6]

3. Since, however, the parties expressly agreed that this credit will be "the f.o.b. price" of the cargoes in question, the Parties are to be considered as having adopted, as regards the reimbursement of these items, the dollar as measure of value, i.e. money of account[7];

4. Consequently, the pounds sterling amount which is to be credited to Greece concerning the cargoes purchased in the United States for dollars, and the marine insurance actually paid in dollars—but only these—must be measured by reference to the dollar;

5. The pounds sterling amount to be credited in respect of the cargoes paid for in dollars must be calculated at the rate prevailing on the date of payment, i.e., in this case, "on the date when the credit due to the Greek Government will be entered."[8]

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[5] ". . . les mesures d'ordre financier concernant le crédit qui doit être inscrit conformément aux dispositions des Sections A et B du présent Accord seront l'objet de négociations ultérieures . . ."

[6] ". . . Le dollar n'a été adopté comme monnaie de contrat, c'est-à-dire de paiement effectif, . . . c'est un crédit en livre sterling que le Gouvernement de S.M. britannique dans le Royaume-Uni a promis d'inscrire dans certaines conditions et au bout d'un certain délai . . ."

[7] "Mais les parties, ayant expressément convenu que ce crédit serait 'du coût f.o.b.' . . . doivent être regardées comme ayant adopté . . . le dollar en tant qu'étalon de valeur, c'est-à-dire de monnaie de compte."

[8] "C'est suivant le cours du change avec le dollar en vigueur à la date du paiement, c'est-à-dire en l'espèce, au jour où aura lieu l'inscription du crédit dû à l'Etat hellénique, . . . que devra être calculé le montant en livres sterling . . ."

III. The Opinion

The Opinion ascertains at the outset that the 1942 agreement which obligates the British Government to credit the Greek Government with the sums representing[9] the cargoes bought for dollars, contains no provision at what rate the dollar amounts are to be converted into pounds sterling; the parties did not even mention either of these moneys. The decision therefore must be based on the broader issue whether (1) the dollar was made the money of contract payable in dollars, or at least was to be the money of account,[10] pounds sterling being only the money of payment, or whether (2) the agreement chose pounds sterling both as money of account and money of payment.

The issue is to be decided on the basis of international law, and not the law of either party. Interpretation of the agreement will also be effected on the basis of international law, with particular regard to the rule that good faith must govern both interpretation and execution, that due consideration must be given to the objective of the agreement, the time and the *milieu* in which it was concluded, but that no interpretation be attempted if the provisions are clear and precise.

A. *The money of payment of the obligation.* It is correct to assume that a single account in pounds sterling was created by the 1942 agreement: this is the money of one of the contracting parties, of the State making the promise, in the territory of which the King of the creditor country lived to escape enemy occupation, and where he expected to receive the credit; pounds sterling was also the money in which the two Governments settled their numerous other monetary transactions resulting from the war. The contracting parties were free, of course, to stipulate any third country's money, and the above assumption could have been rebutted; no proof, however, was offered to rebut the presumption. It follows, therefore, that a single account was created by the 1942 agreement, and it was a credit in pounds sterling which the British Government promised to write in the books of account on certain conditions and at the end of a certain period. The 1942 agreement made pounds sterling the sole money of payment with the exclusion of any other money.

B. *The money of account of the obligation.* The distinction between the role of money as an instrument of payment (money of payment) and as a measure of the value or quantity of the debt is abundant in legal literature[11] and is also

[9] "représentent."

[10] In the unusual terminology of the Opinion, a distinction is made between money of contract and money of account, the difference being, it seems, that the former implies payment in kind. For more usual use of these terms see e.g. Nussbaum, Money in the Law, National and International (Brooklyn, 1950) at p. 364. The term money of contract is usually used as a synonym for money of account in the sense use by Lord Tomlinn, Adelaide Electric Supply Co. v. Prudential Assurance Co. [1934] A.C. 122, 146; *cf.* Mann, F. A., The Legal Aspect of Money (Oxford, 1953) at p. 158.

[11] The Opinion cites specifically Nussbaum, *op. cit. supra* note 10, Martin Domke, "International Loans and the Conflict of Laws," 23 Grotius Society (1937) 47; Penciulesco, La Monnaie de payement dans les Contrats internationaux, 1937; Planiol, Ripert, Radouant, Traité pratique de droit civil, t. VII, Nos. 1191 and 1193; Batiffol, Traité élémentaire de droit international privé, No. 628; Loussouarn, Y., "Note sous quatre arrêts de Paris," 42 Revue Critique de Droit International Privé (1953) p. 389.

made, e.g. by the Uniform Bills of Exchange Law, adopted in Geneva on June 7, 1930.

The Greek Government argued that, if the dollar was not made both the money of account and the money of payment, the dollar should at least be considered to be the money of account. The British Government, on the other hand, maintained that the pound sterling was both the money of account and the money of payment.

In the 1942 agreement, the parties adopted the dollar as the money to serve for the evaluation of the debt[12] in connection with cargoes coming from the United States. This is evident when considering that the first part of the agreement provides that the credit was to be made "on the basis of" f.o.b. cost of the cargoes, and the second part of the agreement stipulates that the Greek Government be credited "with the f.o.b. cost" of the cargoes; the price of the cargoes in question was in dollars; it necessarily follows, therefore, that this cost must be evaluated in dollars in entering the credit in favor of the Greek Government. The Greek Government cannot be indemnified by anything but pounds sterling valued at the place and at the time of the unloading of the cargoes. On the other hand, the cost of the insurance which was to be calculated at the prevailing rate in London, cannot be held to have been owed in dollars; this would be contrary to the spirit of the agreement which aimed at compensation.

C. *Conversion Rate.* The final question to be determined is which rate to apply in calculating the pounds sterling amount to be entered on the basis of the dollar debt: the rate prevailing at the date of settlement[13] or the date when the debt arose.

International legislation, case law, and jurisprudence, like the laws of most nations, provide for conversion of the money of account into the money of payment at the rate prevailing at the date of payment. This is also in conformity with the provision of Article 49 of the Uniform Bill of Exchange Law, and with the decision in the Serbian and Brazilian Loan cases. But there are two specific considerations based on the facts of this particular case which call for adopting the rate of the day of actual payment:

(a) Since the British Government undertook to credit the Greek Government with the f.o.b. price of the cargoes in question, the pounds sterling account to be entered according to the dollar cost must be calculated necessarily [sic] as of the day when the actual entry takes place. The explicit provision of this clause is not affected by the fact that it was the debtor's fault that the credit was not entered before the devaluation of the pound. Furthermore, the British Government could not establish the fault of the Greek Government that the negotiations provided for in the third part of the agreement [concerning the financial settlement of the account] were delayed.

(b) The 1942 agreement was strictly nonspeculative in character, aiming at indemnification "at cost"; the creditor was to receive at the moment when he is credited with pounds sterling exactly what the cargoes cost in dollars.

[12] "le dollar . . . a été adopté . . . comme monnaie de référence pour l'évaluation de la dette."
[13] "règlement."

IV. Critique

To hold that the money in which an account is kept is not the money of account of the corresponding debt sounds startling but may be correct under exceptional circumstances. If an account is kept in a given money, e.g. in French francs, with an agreement that on due date the amount to be paid be determined by references to a cost-of-living index, the money of account is indeed not simply the franc. The case under review, however, presents no such exceptional circumstances, and it is submitted that the money of the account is the "money of account," i.e. pounds sterling.

It is further submitted that indiscriminate application of the day of payment rule of conversion may—as it does in the present case—lead to unjust and erroneous results.

A. *Money of payment, money of account, and money of reference.* In analyzing the structure of a foreign money obligation, it is usually sufficient to consider but two kinds of money: the one in which the obligation is established (money of account) and the money in which payment is actually to be made (money of payment). If the debtor owes a sum of dollars payable in pounds sterling, the appreciation of the dollar (money of account) during the life span of the obligation will result in a larger amount of pounds sterling payable on due date and vice versa; that is why it can be said that the money of account establishes the quantum of the obligation ("how much") while the money of payment determines the mode of payment ("how," in what currency). The creditor's ship sails on the waters of the money of account, rising with its tide, sinking with the ebb. All this is rather elementary, of course, and the decision takes clear cognizance of this distinction.

There are monetary obligations, however, with a structure involving a third money, a money which is used to determine the numerical amount of the money of account. "A phenomenon, which often obscures monetary agreements," complains Professor Nussbaum whom the arbiter quotes abundantly, "is the contractual reference to a sum which does not fix the amount of the debt, but merely serves as a calculating factor, or 'measure' in its determination."[14] Sometimes there is a sum stipulated in one money but a fixed ratio establishes how much in a different money is actually owed (*clauses de garantie de change*)[15]: e.g. the debtor promises to pay 100 pounds in dollars at the fixed ratio of 2.80 to the dollar; what is owed is $280, unaffected by any change in the actual rate between the dollar and pound. In other instances, no such fixed ratio leads to the money of account.[16] What is characteristic of the "money of measure" or "money of reference" is that its role is confined to *leading* to the money of account; it merely serves as an aid, an arithmetic device, to establish how much is owed in the money of account. The money which is the money of account determines the quantum of the obligation during its life (from creation to discharge), while the

[14] Nussbaum, *op. cit.* p. 382.
[15] *Ibid.* citing numerous examples.
[16] *Ibid.* p. 385, citing numerous cases.

money of measure serves merely to crystallize the initial numerical amount of the money of account.

The facts of the present case have now to be analyzed to establish whether the dollar was both the money of measure and the money of account, pounds sterling being only the money of payment (which would lead to the result of the arbiter) or, on the contrary, the dollar was merely money of measure, the pound sterling being both the money of account and the money of payment.

When the parties entered into the 1942 agreement, it was not known how many cargoes would be taken over by the British Government, and the amount that was to be credited to the Greek Government was uncertain in dollars as well as in pounds. It was inevitable, therefore, that the amount to be credited was not numerically specified. But as the arbiter convincingly concluded, there is no doubt that the credit entry was to be made in pounds. Furthermore, the contemplation of the parties, as the arbiter correctly found, was clear that this credit should be entered in the books of account immediately when the underlying amounts (dollar costs) could be established. It follows that the parties "took a chance" on the fate of the pound sterling as the carrier of the obligation, the dollar serving as an arithmetic aid to fix the number of pounds of the credit.

Argumentum a contrario: had the parties intended to make the dollar the money of account, they would have stipulated—expressly or by implication—that the Greek Government be credited with a dollar amount. The arbiter held—correctly and on the basis of convincing arguments—that this was not the case, and that the credit entry was to be made in pounds sterling.

It should be examined, as the last test, whether the agreement did not call for two moneys of account, succeeding each other: whether the money of account was not first the dollar until the credit entry was made, and from that moment on the pound sterling. Such change in the money of account, so to speak in midstream, is conceptually quite feasible. The parties to a contract may well agree that the debt be in dollars, but that on a certain date the obligation be converted into pounds sterling at the then prevailing rate, and that payment finally be made in, say, Swiss francs at the then prevailing rate between the pound and the franc. It is submitted that the present case does not have these elements.

The agreement did not establish the obligation in dollars; it called for a credit in pounds *on the basis of*[17] the (dollar) purchase price. This means that the dollar amount of the f.o.b. values was not to live on as a dollar obligation, but was to be converted immediately into a pounds sterling amount. The choice of the money of account is tantamount to selecting the money which is to determine the quantum of the obligation; the reference to a money of measure should not defeat this intention of the parties.

All this merely clears the conceptual ground. But the main issue, at what

[17] Section "A" of the Agreement uses the word "on the basis of," while Section "B" provides for crediting the Greek Government "with" the f.o.b. cost of the cargoes, see *supra*, notes 3 and 4.

rate the dollar amount (the money of measure) is to be converted into pounds sterling will now more easily be established.

B. *Conversion Rate.* The facts of this case do not present a situation of unlawful conversion; we deal with a contract situation. It was not incumbent on the arbiter therefore to give, by the choice of the conversion rate, compensation for the depreciation of the currency which was the money in which the credit was to be entered. It was his duty to ascertain as the correct rate of exchange such a rate as would bring the parties into the position in which they would have been had they done what they contracted to do.

If the British Government had made the credit entry in favor of the Greek Government when due, the Greek Government would have received a credit balance of pounds calculated at the rate of exchange of the day of entry. If payment had not been made to date (the date of liquidation of the account was expressly left to future agreement, so there was no default in the *payment* of the pound balance), the Greek Government would now have to its credit the same amount in pounds. The rate suggested by this reasoning is the one that prevailed after a reasonable time subsequent to the 1942 Agreement, i.e. the rate of 4.03.

The arbiter argued that the great majority of the international and national statutes and cases, as well as the legal literature, established the rule that the money of account is to be converted into the money of payment at the rate of the day of payment. This, it is submitted, is an oversimplification. It is probably correct to say that "civil law courts exhibit a tendency to throw the risk of depreciation of the money of damages upon the wrongdoer,"[18] but the present case is not based on tort. How confused the conversion rule is in contracts, has been shown elsewhere in this Journal.[19] A single conversion rule which does not differentiate between different situations would, indeed, be very dangerous.[20] Even in largely identical cases, different rates may be proper for each situation.[21]

But even if, *arguendo*, the existence of a hard-and-fast rule of international law were to be assumed, according to which the money of account would always have to be converted into the money of payment at the payment day rate, this rule would not be applicable to the present case: first, because it does not involve conversion for the purpose of payment (extinctive conversion), and, second, because it does not present a case of conversion from the money of account

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[18] Nussbaum, *op. cit. supra* note 10, at p. 406, with citations to support the generalization.

[19] Dach, J., "Conversion of Foreign Money, A Comparative Study of Changing Rules," 3 American Journal of Comparative Law (1954) 155.

[20] Charles Evan, in "Rationale of Valuation of Foreign Money," 54 Michigan Law Review (1956) 307, at p. 325, comes to the conclusion that the New York courts have rejected any "mechanical" rule of conversion: "The courts, although frequently saying that they were applying the mechanical rule, in fact tested the results by examining whether it was 'just.' This subordination of the mechanical rules to the requirement of 'justice' in truth constituted their complete repudiation."

[21] "Le vérité consiste dans les nuances." Renan. Motto, heading the chapter "The Determination of the Money of Account" in Dr. Mann's book, *op. cit., supra,* note 10, p. 182.

"into money of payment." The date of the entering of a credit cannot be equiparated with actual payment. What the day of payment rule accomplishes is that the obligation continues to live as the original money of account until the very end when discharged, thereby fulfilling the supposed intention of the parties that this money (the money of account) shall be that which establishes the quantum of the obligation. This objective—that the amount of the obligation should fluctuate according to the changes in the value of the money of account—is achieved at the inception of the obligation's life if the date of conversion from the money of measure into the money of account is pushed back to the date when the arithmetical amount in the money of measure was, or should have been, established.

"International law has always emphasized the idea of effectiveness of any award of compensation or damages and should therefore not find it difficult to award such sums of money as will effectively take care of changes in monetary value, from which, in justice, the creditor should not be required to suffer."[22] It may be added that, in justice, neither should the debtor be required to suffer.

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[22] Mann, *op. cit., supra,* note 10, p. 456.

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Digest of Foreign Law Cases

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Dwyer v. Folson, 139 F. Supp. 571 (E.D.N.Y. March 29, 1956): status of person as widow of deceased wage earner depending on validity of Mexican mail order divorce decree obtained from first husband; invalidity in N.Y. State of domicile of decedent; person not entitled to widow's benefits under Social Security Act.

Estonian State Cargo and Passenger Steamship Line v. United States, 139 F. Supp. 762, 1956 A.M.C. 1094 (Ct. Cl. April 3, 1956): price of sale of three British flag ships subject to restrictions under British law; market value of nationalized Estonian steamship line's vessel requisitioned by United States on September 16, 1941, for compensation to former private owners; conflict between such owners and Estonian Soviet Socialist Republic over title to vessel delaying compensation; title not adjudicated until Dec. 1, 1953, in The Maret, 116 F. Supp. 447, 126 Ct. Cl. 809.

Fantony v. Fantony, 122 A. 2d 593 (New Jersey May 14, 1956): effect of Cuban divorce decree on custody of daughter born in New Jersey; intervention of Republic of Cuba; finding of fact of domicile by Cuban court not conclusive; public policy of New Jersey.

F.A.R. Liquidating Corporation v. Brownell, 140 F. Supp. 535 (D. Del. Apr. 12 1956): sending by German company from Germany of telegram consummating assignment of American patents prior to effective time of Ex. Ord. 8785 blocking such property.

Ferrer v. United States, 140 F. Supp. 954 (Ct. Cl. July 12, 1956): compensation to officer in Philippine Army under Missing Persons Act, 56 Stat. 143; service in Cebu Area Command, a guerilla organization.

Figueroa v. People of Puerto Rico, 232 F. 2d 615 (First Cir. April 18, 1956): waiver of right of trial by jury under laws of Puerto Rico; Pen. Code Puerto Rico § 438; Code Crim. Proc. Puerto Rico § 178; Const. Puerto Rico, art. 2, § 11.

Finger v. Wolff, 135 N.Y.L.J. May 9, 1956, 10 col. 7: modification of Alabama custody decree denied to mother who wanted to take five year old child to Laos, Indo-China, where new husband assigned as foreign service officer, due to conditions in that war-torn country.

Fleischmann's Petition, In re, 141 F.

Supp. 292 (S.D.N.Y. May 16, 1956): relief of Swiss citizen from military service in U.S. bars naturalization though under active duty as soldier of Swiss Army not permitted to enter foreign military service.

Fong Sen v. U.S. Immigration & Naturalization Service, 137 F. Supp. 236 (E.D. Louisiana Jan. 6, 1956): judicial notice under Refugee Relief Act of 1953 that Hongkong is British Crown Colony and that "British authorities there have not undertaken any persecution of anyone for race, religion, or political opinion."

Frausto v. Brownell, 140 F. Supp. 660 (S.D. Cal. April 16, 1956): voting due to duress by Mexican 'comisario,' in Mexican election.

Gallie Corp'n. v. Bankers Commercial Corp'n., 135 N.Y.L.J. June 19, 1956, 9 col. 4: diversion to Honduras of vessel of Honduran registry on voyage from N. Y. to New Zealand.

Garber, In re, 136 N.Y.L.J. July 26, 1956, 2 col. 7: examination of witness not "outside scope of judicial borders of Argentine court."

Gardner v. Gardner, 233 F. 2d 23 (Cir. D. Col. April 30, 1956): Portuguese marriage as affected by previous divorce obtained in Dominican court.

Gonzales v. United States, 140 F. Supp. 102 (D. Puerto Rico May 1, 1956): no recovery of damages by maternal grandmother under sec. 1802 Civil Code of Puerto Rico; discussion of Puerto Rican case law.

Graham v. Panama Canal Company, 139 F. Supp. 271 (D. Canal Zone Feb. 1, 1955): investigation of damages prior to vessel's departure from Canal Zone indispensable to asserting claim; general waiver of sovereign immunity authorized by Congress in setting up defendant corporation.

Granadaisa Foods v. Compania de Navegacao Carregadores Acoreanos, 139 F. Supp. 538 (E.D.N.Y. April 3, 1956): damages to canned sardines shipped from Portugal to New York; proof that water damage was not fault of carrier.

Guerrido v. Alcoa S.S.Co., 234 F. 2d 349 (First Cir. June 8, 1956): Puerto Rico's navigable waters to be regarded as navigable waters of the United States subject to federal jurisdiction; Workmen's Accident Compensation Act of Puerto Rico.

Hannah v. State, 92 S.E. 2d 89 (Georgia March 14, 1956): oath of jurors under law of England in force in original 13 colonies, including Georgia, prior to their independence (p. 95).

Hansen v. Brownell, 234 F. 2d 60 (Cir. D. Col. May 10, 1956): enemy qualification of British subject as employee of German Rundfunk, Government's radio monopoly, though residing in Paris, France, and carrying British passport.

Harris v. Boreham, 233 F. 2d 110 (Third Cir. April 30, 1956): Superintendent of Public Works of municipality in Virgin Islands not "employee of the government of the United States" within Federal Tort Claims Act.

Harrison v. United Fruit Company, 141 F. Supp. 35 (S.D.N.Y. May 18, 1956): action for personal injuries sustained in airplane accident in Honduras.

Hawaiian Airlines v. United States, 139 F. Supp. 942 (Ct. Cl. April 3, 1956): collision in 1942 with Army airplane in Territory of Hawaii.

Hawthorne Steel Corp. v. Arlington Steel Corp., 153 N.Y.S. 2d 85 (App. Div. First Dep. July 3, 1956): delivery to Canadian buyer of French steel from France in 1950; letter of credit to be issued by Canadian bank.

Hearst v. Hearst, 150 N.Y.S. 2d 746 (June 21, 1955): under law of State of Chihuahua, Mexico, divorce decree dissolves marriage as of day of entry of judgment; insufficient notice of action by State's Attorney in Chihuahua to annul Mexican marriage; denial of due process under art. 14 and 16 of the Constitution of Mexican Republic; Mexican annulment decree therefore not binding.

Hechler, In re, 136 N.Y.L.J. July 12, 1956, 2 col. 8: sale of incompetent's interest in her deceased husband's estate in Germany.

Henderson v. Drake, 292 P. 2d 254 (Cal. App. Jan. 23, 1956): Mexican judgment obtained without due process of law and without jurisdiction over defendant a nullity.

Hiroshi Okada v. Dulles, 134 F. Supp. 183 (N.D. Cal. Sept. 16, 1955): failure of dual national to protest conscription into Japanese army no basis per se for expatriation.

Hirsch Lumber Co. v. Weyerhaeuser Steamship Co., 233 F. 2d 791 (Second Cir. June 1, 1956): reference to English decision of Jan. 20, 1956 under the Water Carriage of Goods Act, 1936, of the Dominion of Canada (p. 795).

Husney's Petition, In re, 140 F. Supp. 503 (E.D.N.Y. April 19, 1956): Syrian national claiming in 1943 exemption from military service as neutral thereby barred from citizenship.

Hyman-Michaels Company v. United States, 140 F. Supp. 784 (Ct. Cl. May 1, 1956): effect of Iraqui government's denial of export of barbed wire located at Shaiba Depot, Iraq.

Internat. Film Distribution Establishment v. Paramount Pictures Corp'n., 136 N.Y.L.J. August 6, 1956, 3 col. 3: effect of action in Italy for tort committed in Italy; no presumption of "application of our common law"; failure to allege the law of Italy.

Jussila, Estate of, 136 N.Y.L.J. August 13, 1956, 2 col. 8: testimony of Consular Secretary of Consulate General of Finland as expert on Finnish law; keeping parish records under Finnish Church Law of 1944.

Kadar, Estate of, 151 N.Y.S. 2d 1002 (Surr. Ct. April 6, 1956): discovery proceedings relating to custody of American assets of resident of Hungary in name of Swiss attorney.

Kelekian, Estate of, 136 N.Y.L.J. August 13, 1956, 2 col. 7: children as forced heirs with respect to real property located in France; reference to English decisions on the doctrine of equitable election (Restatement, Conflict of Laws, sec. 252).

Kinsella v. Krueger, 76 S. Ct. 886 (June 11, 1956): no constitutional bar to court-martial in Tokyo, Japan, for murder of husband, colonel in U.S. Army.

Kirschner v. Bank Leumi Le-Israel B.M., 136 N.Y.L.J. August 15, 1956, 2 col. 6: commission to take testimony in Israel.

Kiviranta v. Brownell, 141 F. Supp. 435 (D. Col. May 28, 1945): Finnish seaman's draft exemption in 1943 as neutral alien.

La Cotonnière de Moislains v. H & B American Machine Co., 19 F.R.D. 6 (D. Mass. March 6, 1956): action of French corporation to enforce arbitration award for breach of contract for sale of cotton manufacturing machinery and its installation in France.

Laff v. Laff, 136 N.Y.L.J. July 6, 1956, 6 col. 1: annulment of divorce obtained in courts of Mexico.

Lavdas v. Holland, 139 F. Supp. 514 (E.D. Pennsylvania Nov. 28, 1955): political and governmental situation in Greece does not justify fear of Communist reprisals within meaning of Displaced Persons Act to avoid deportation.

Lemaire v. Kentucky & Indiana Terminal Railroad Co., 140 F. Supp. 82 (S.D. N.Y. March 12, 1956): English law controlling 1911 issue of bonds payable in England in pounds sterling 'in like gold coin'; monetary system prevailing in England and English case law; promise, under English law, does not amount to gold value payment clause.

Luckett v. Cohen, 25 U.S. Law Week 2058 (S.D.N.Y. July 23, 1956): recovery on note payable in foreign currency; defective complaint when not alleging where note made, delivered or payable.

MacDonald v. United States, 139 F. Supp. 508 (D. Mass. March 27, 1956): gift in 1946 of Canadian land by U.S. citizen subject to gift tax.

MacPherson v. MacPherson, 1 Misc. 2d 1049 (Sup. Ct. Monroe Co, N. Y. March 15, 1956): invalidity of divorce decree obtained in Juarez, State of

Chihuahua, Mexico; wife's power of attorney to Mexican attorney.

McCaffrey v. Cunard Steamship Company, 139 F. Supp. 472 (S.D.N.Y. Sept. 2, 1955): Irish law governing contract for passenger transportation across Atlantic when made in Ireland; 1922 Irish Constitution adopted prior English law in absence of express conflict; applicable English law on limitation of liability expressed on passage ticket; British case law (p. 474).

Meredith v. Goddard, 135 N.Y.L.J. March 30, 1956, 5 col. 8: recognition of divorce decree obtained by residents of Guernavaca, Mexico.

Miller v. United States, 140 F. Supp. 789 (Ct. Cl. May 1, 1956): sale of surplus Government aircraft located in Germany under terms of Office of Foreign Liquidation Commissioner, Department of State; effect of prevention of actual passage to Middle East for reasons of national policy.

Miltenberg & Samton v. Mallor, 1 A.D. 2d 458, 151 N.Y.S. 2d 748 (First Dep. May 8, 1956): false labels on herring as California mackerel to deceive customers in Egypt; statement on local Egyptian regulations on labeling; illegality of guarantee to be responsible for deceit.

Mirabile, Matter of, 136 N.Y.L.J. August 7, 1956, 3 col. 8: Italian mother of deceased as non-resident alien not qualified as administratrix and therefore may not delegate rights.

Mitchell v. Rubio, 139 F. Supp. 379 (D. Puerto Rico April 5, 1956): Fair Labor Standards Act of 1938 applicable to Puerto Rico.

Morgan Estate, 2 District & County Reports 480 (Orphan Ct., Lucerne Co., Pa. Oct. 13, 1954): death in prisoner-of-war camp in Korea; will executed by 19 year old soldier admitted to probate since Wills Act of April 24, 1947, P.L. 89, uses 'war' not in legalistic sense of a solemn 'declared' war.

Namba v. Dulles, 134 F. Supp. 633 (N.D. Cal. August 4, 1955): failure of dual national to protest, at height of war, conscription into Japanese Imperial Army did not result in expatriation.

New York & Honduras Ros. Min. Co. v. Riddle Airlines, 152 N.Y.S. 2d 753 (April 6, 1956): agreed valuation of dore bullion (mixture of gold and silver produced in Central America) when delivered to foreign air carrier in San Salvador, Honduras.

Nortuna Shipping Company v. Isbrandtsen Company, 231 F. 2d 528, 1956 A.M. C. 837 (Second Cir. March 27, 1956): no waiver or laches of right to arbitration of claims of tug owner arising out of 1949 collision in Le Havre, France.

Oehmichen v. Brownell, 24 U.S. Law Week 2497 (D. Col. April 18, 1956): temporary return to German-held territory for purpose of obtaining release from U.S. alien internment camp does convert resident German alien in 'resident' within sec. 2 Trading with the Enemy Act.

Panama Canal Company v. Wagner, 234 F. 2d 163 (Fifth Cir. June 5, 1956): common law to be resorted to in interpreting Canal Zone Code.

Parsons & Whittemore v. Rederiaktiebolaget Nordstjernan, 141 F. Supp. 220, 1956 A.M.C. 1123 (S.D.N.Y. March 22, 1956): arbitration under Shippers Rate Agreement of Pacific Coast European Conference; recovery of alleged excess payments from Swedish steamship line for carriage of wood pulp shipments to European ports.

People v. Carcel, 150 N.Y.S. 2d 436 (City Ct. March 30, 1956): city police officers authorized to arrest Puerto Ricans picketing main entrance to United Nations; U.N. Headquarters Agreement, Joint Resol. August 4, 1947, 22 U.S.C.A. § 287 note.

People v. Carrero, 139 F. Supp. 275 (D. Virgin Islands Dec. 28, 1955): arrest for reckless driving under Code of Laws, Muncipality of St. Croix, Virgin Islands.

Perkins, Will of, 2 A.D. 2d 656, 152 N.Y.S. 2d 315 (First Dep. June 5, 1956): bequest to nationalized in-

firmaries in Leeds and Bradford, Yorkshire, England; reference to English and Scottish cases under National Health Service Acts (p. 658, 319).

Phelan v. Taitano, 233 F. 2d 117 (Ninth Cir. April 10, 1956): enforcement of separate territoral income tax in Guam on income earned by citizens of Guam in that territory.

Ragazzi, Matter of, 136 N.Y.L.J. July 12, 1956, 6 col. 4: payment of deposits under 1943 decree with City Treasurer to Consul General of Italy.

Rederiaktiebolaget v. Compania De Navegacion Anne, S.A., 139 F. Supp. 327 (D. Canal Zone April 27, 1955): charter party of Finnish corporation for Panamanian vessel; intervention of Swiss mortgage bank; validity of mortgage under Panamanian law; English and Canadian cases on preferred ship mortgages (p. 335).

Reid v. Covert, 76 S. Ct. 880 (June 11, 1956): trial at U. S. Air Force base in England of wife for murder of husband, Air Force Sergeant; continuance of military jurisdiction.

Renewal Mfg. Co. v. Sauter & Cie, 135 N.Y.L.J. June 7, 1956, 6 col. 5: testimony of witness in Germany; rule 126 of N. Y. Rules of Civil Practice.

Reyes, Application of, 140 F. Supp. 130 (D. C. Hawaii April 12, 1956): Kwajalein Island, even though trust territory administered by U.S., not to be considered part of U.S. for purpose of naturalization of native of Philippines.

Rheinisch-Westfaelische Bank Aktiengesellschaft v. Voss, 136 N.Y.L.J. July 5, 1956, 4 col. 4: issuance of commission "to a suitable person in Germany".

Richard J. Spitz, Inc. v. Dill, 140 F. Supp. 947 (S.D.N.Y. March 22, 1956): prohibition of importation of cassia (cinnamon) from China, physical examination by Collector of Customs as to origin of merchandise.

Rosello Hnos. Inc. v. Figueroa, 233 F. 2d 248 (First Cir. May 11, 1956): concept of 'good faith' in Reasonable Rents Act of Puerto Rico to authorize landlord to withdraw leased premises for own use.

Rottenari, Estate of, 136 N.Y.L.J. August 9, 1956, 3 col. 6: establishment of death of Hungarian national who had returned to Hungary in 1938, as having occurred in 1944; indemnity bonds for banks holding deposits.

Rubinraut v. Federico Causa Consignataria Sociedad Anonima, 136 N.Y.L.J. July 3, 1956, 4 col. 4: Cuban law and custom on maritime lien.

San Geronimo Develop. Co. v. Treasurer of Puerto Rico, 233 F. 2d 126 (First Cir. April 30, 1956): imposition of local property taxes upon lands in Puerto Rico leased from U.S. on 999 year lease.

Scarf v. Trans World Airlines, 233 F. 2d 176 (Second Cir. May 2, 1956): Injuries sustained at the Gander airport in Newfoundland, Canada.

Scharl, Estate of, 136 N.Y.L.J. August 9, 1956, 3 col. 7: commission on interrogatories of witness in Heidelberg, Germany, issued to American Consul.

Schoech, Matter of, 136 N.Y.L.J. July 26, 1956, 6 col. 3: powers of attorney given to Austrian Consul.

Scibilia v. Dulles, 141 F. Supp. 47 (E.D.N.Y. May 15, 1956): voting in 1946 in Italian area under control of American Army not involuntary.

Smick v. Smick, 135 N.Y.L.J. June 1, 1956, 13 col. 5: denial of motion to enjoin defendant from prosecuting divorce action in Juarez, Chihuahua, Mexico, because of the latter's invalidity under doctrine of Rosenbaum v. Rosenbaum, 309 N.Y. 371.

State Export Co. v. Mol Shipping & Trading Co., 135 N.Y.L.J. June 27, 1956, 7 col. 1: sale of bicycles imported from German manufacturer; alleged disloyalty in service during employment.

Stephen v. Ziwnostenka Banka, 135 N.Y.L.J. June 28, 1956, 6 col. 6: receivership, pursuant to sec. 977-b N.Y. Civil Practice Act, over assets of nationalized Czechoslovakian bank and of its alleged successor, State Bank of Czechoslovakia, claiming im-

munity as instrumentality of sovereign state of Czechoslovakia; trial of issue of nationalization that bank ceased to do business; depositions taken in the People's Court of Prague, Czechoslovakia; 155 N.Y.S. 2d 340.

Stipa v. Dulles, 233 F. 2d 551 (Third Cir. May 16, 1956): economic duress compelling dual citizen to accept employment in Italian Police Force prevents expatriation.

Stronghn v. Chilean Line, 135 N.Y.L.J., June 4, 1956, 9 col. 1: indemnity contract for Chilean defendant and Compania Sud-Americana de Vapores not referable to assaults committed by their employees or agents.

Szekely v. Eagle Lion Films, 140 F. Supp. 843 (S.D.N.Y. May 8, 1956): filming of motion picture in England; common law literary property.

Taeni, Estate of, 135 N.Y.L.J. June 26, 1956, 8 col. 7: proof of death of absentee who resided in Austria and removed to France; residence in France; French judgments only element of proof and not conclusive.

Taterka v. Brownell, Civ. 85-31, S.D.N.Y. July 5, 1956: ownership of stock in German Corporations, allegedly confiscated by German authorities in late 1930's as part of anti-semitic campaign; 143 F. Supp. 57.

Territory of Alaska v. The Arctic Maid, 140 F. Supp. 190 (D. Alaska March 17, 1956): Alaskan license tax on occupation of freezer ships not of confiscatory character, denying right to preserve fish in violation of due process clause (p. 199).

Tumbridge, Matter of, 136 N.Y.L.J. July 10, 1956, 3 col. 3: recognition of divorce decree of Bermuda court.

United States v. California Eastern Lines, 231 F. 2d 754 (Cir. D. Col. Febr. 16, 1956): charter between shipowner and British Ministry of War Transport for shipment of war supplies to Red Sea ports not renegotiable contract, since British Ministry did not act as agent for U.S. government in executing charter negotiated by Maritime Commission; no ruling as to 'force of proof' of British Government's statement (p. 760).

United States v. Holland-America Line, 231 F. 2d 373 (Second Cir. March 14, 1956): letter from British Consulate that alien might have lost citizenship of Great Britain whence he came, and suggesting deportation to Argentina.

United States v. Icardi, 140 F. Supp. 383 (D. Col. April 19, 1956): alleged perjury in statement regarding disappearance of Major Holohan in Italy on Dec. 6, 1944; Italian affidavits on circumstances surrounding death.

United States v. Rios, 140 F. Supp. 376 (D. Puerto Rico April 11, 1956): Firearms Act not applicable to Commonwealth of Puerto Rico, no longer a territory of the U.S.

United States v. Sanders, 24 U.S. Law Week 2497 (Ct. Mil. App. April 20, 1956): airman's sleeping on guard post in Korea not committed 'in time of war' when occurred in 1955, after armistice of July 27, 1953.

Vanity Fair Mills v. T. Eaton Co. Ltd., 243 F. 2d 633. (Second Cir. June 1, 1956): no enjoinment of Canadian's use in Canada of trade marks registered in Canada.

Varga v. Credit Suisse, 136 N.Y.L.J. August 3, 1956, 3 col. 1: action for recovery of funds by present President of National Hungarian Government in exile; service on N. Y. agency of Swiss Bank.

Velasquez, Petition of, 139 D. Supp. 788 (S.D.N.Y. April 4, 1956): national of Peru barred from naturalization because of application for relief from military service.

Verney, Petition of, 141 F. Supp. 190 (S.D. Cal. April 27, 1956): trial of Army civilian employee by military court in Japan; Administrative Agreement under art. 3 of Security Treaty between U.S. and Japan.

Walton v. Arabian American Oil Company, 233 F. 2d 541, 1956 A.M.C. 1039 (Second Cir. May 15, 1956): dismissal of claim of American injured in Saudi Arabia for failure to prove 'law' of that foreign country; un-

determined whether Saudi Arabia has 'civilized' legal system.

Wertheimer v. Bank of Nova Scotia, 140 F. Supp. 950 (S.D.N.Y. March 10, 1956): sale of shares to Canadian bank; delivery to its agency in New York City.

Wilcoxon v. United States, 231 F. 2d 384 (Tenth Cir. March 8, 1956): failure to translate oath into Spanish of witnesses not speaking English sufficiently; waiver of objection.

Wilkinson v. Equitable Life Assurance Society, 151 N.Y.S. 2d 1018 (Mun. Ct. N.Y. May 7, 1956): Korean conflict constitutes war under life insurance policy excluding double indemnity benefit in event of 'war, whether declared or undeclared'.

Wilson v. Kennedy, 232 F. 2d 153 (Ninth Cir. April 10, 1956): separate territorial income tax in Guam to be enforced by proper officials of government of Guam.

Zapolsky, Matter of, 2 Misc. 2d 103, 151 N.Y.S. 2d 219 (Surr. Ct. March 21, 1956): disappearance of legatees named in 1945 will as residents of Slonim, Poland, a town that was destroyed during war; legacies part of residuum.

Zerbo v. International Food Trading Co., 135 N.Y.L.J. May 8, 1956, 8 col. 3: delivery of drafts to Banco Popolare di Novara, Venice, Italy; requirement of official court interpreter in the Italian language.

Zietz, Estate of Hugo, 1 N.Y. 2d 748, 152 N.Y.S. 2d 295 (N.Y. April 26, 1956): estoppel by Swiss judgments regarding validity of German divorce decree; their res judicata effect.

Book Reviews

DE LAUBADÈRE, A. *Traité théorique et pratique des contrats administratifs*. Paris: Librairie Générale de Droit et de Jurisprudence, 1956. 3 vols. Pp. 383; 415; 454.

Administrative contracts form one of the basic problems of French administrative law. Created and developed almost exclusively by the praetorian jurisprudence of the French *Conseil d'Etat*, administrative contracts, a particular category within the broad structure of consensual acts, have enriched in a remarkable way the arsenal of modern actions in public administration. The French example proves in a spectacular way that the period of unilateral acts, "orders," of the administration is definitely over: the voluntary agreement of the parties, i.e., the public agent who represents the administration, and the private contractor, both of whom are in collaboration, is an addition to the classical types of administrative acts, and its importance increases everywhere. The present reviewer had the opportunity to treat this question in Volume 3, No. 1 of this Journal, and has characterized briefly (pp. 340–347) the useful contribution of French administrative law to the general practice of administration. This monumental creation of French judges and the memorable doctrinal analyses of Gaston Jèze (1927–1936) and, later, of Georges Péquignot (1945), cleared the specific climate of French administrative law, helped to understand the creative role of the *usus fori* in the jurisprudence of the *Conseil d'Etat*, and illuminated the perspectives of legal evolution.

André de Laubadère, professor of administrative law in the University of Paris, adds in his present book a doctrinal and practical treatise to the above-mentioned works. In giving minute attention to the most recent case law, without however neglecting earlier views, he brings various conceptions up to date, which have been superseded in part by the complete change of jurisprudence and the progress of doctrine. Thanks to his great gift for analysis and to the rare clarity of his presentation, the treatise reads easily, and even the particularly complicated problems become accessible to a non-specialist reader. The author has already published various treatises, among others the *Manuel de Droit Administratif* (four successive editions between 1946 and 1955) and, above all, the magistral work, *Traité Élémentaire de Droit Administratif* (1953), without the knowledge of which it is literally impossible at the present time to study French administrative law in any of its aspects.

The wealth of the contents of the present work makes it impossible to go into a detailed exposition. The administrative contract is studied from its inception (formation) to its extinction, together with its general effects: the obligations of the parties (of the private contractor as well as of the administration); the sanctions; the execution of contracts and the incidence of "new facts" upon the execution (unforeseen difficulties, arbitrary acts of the government (*fait du prince*), lack of foresight), and finally, the adjudication of these contracts (non-

judicial procedures of settling litigation arising from contracts, competence of courts, judicial recourse). Thanks to exhaustive analytical tables (by the individual volumes and also for the whole treatise) as well as the alphabetical index and the reproduction of some of the important legislative texts, the orientation of the reader is greatly facilitated.

Of special interest to the reader (especially to the foreign reader) is the fact that the author has not limited his discussions to a single sector of the practice and science of administrative law in France. In many instances, he goes beyond this sector and gives an outline of the general theory of French administrative law. For instance, it might be of interest in this context to illustrate the treatment given to the evolution of the doctrine of "public services" (*service public*), which was formerly the cornerstone of French administrative law and today is in total decline. This was the view, for instance, of Léon Duguit, who scarcely three decades ago declared that in administrative contracts, "The public service as an end *explains everything*." (*Cf.* for instance, "*Les transformations du droit public*," Paris, 1925). Professor de Laubadère departs from these views of Duguit in spite of the fact that he was his student and still considers him his master; he emphasizes, to the contrary, in the light of the current practice of the *Conseil d'Etat*, the importance of "exorbitant clauses" (*clauses exorbitantes*) forming the *differentia specifica* of modern administrative contracts; the difference between the old and present conceptions of clauses "which bear the administrative mark," inasmuch as such clauses were considered as specifically belonging to public law and now they might just as well be stipulated in "civil" contracts. Thus, the fundamental problem of "public service," which was used indiscriminately in French law, has been clarified at least to the extent to which the present status of French jurisprudence and French doctrine permit.

The work under review has been characterized by Marcel Waline, the predecessor of the author in the faculty of Paris, as a "*chef d'oeuvre*" (*cf.* Revue de Droit Public, 1956, p. 179) and will doubtless have profound influence abroad. It marks at the same time the continuity of French legal thought in public law and proves that in spite of political cataclysms and social transformations, the "golden age" of the science of public law in France did not end with the death of the generation of Hauriou and Duguit.

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MAURACH, R. *Handbuch der Sowjetverfassung*. Veröffentlichungen des Osteuropa-Institutes, Band XIV. München: Isar Verlag, 1955. Pp. 429.

This book is truly a definitive critical commentary on the operation of the Constitution of the Soviet Union. Written by an eminent German scholar, the work is based upon a life-long study of Soviet law in general in all its fields and details. Any serious scholar of Soviet law and state will hardly make a statement concerning the Soviet Constitution without having previously consulted the abundant material afforded by the book. The provisions of the

Constitution are presented in the light of Soviet constitutional history; i.e., similar or deviating provisions of the R.S.F.S.R. Constitution of 1918 and the U.S.S.R. Constitution of 1924 are briefly indicated. Moreover, the author definitely attempts and succeeds in presenting the operation of the constitutional provisions in practice. The author generously draws upon what may be called Soviet "unwritten" constitutional law, i.e., established practices which are occasionally in palpable contradiction with the provisions written in the Constitution and nevertheless prevail. In other words, the reader gets a fair idea of such practices, which may not be called unconstitutional officially only because their constitutionality was never challenged and such a challenge is out of place in the Soviet reality and in Soviet law.

The form selected by the author for his work, *viz.*, a commentary, is common in European and especially German jurisprudence. A commentary, in which the bulk of the observations and analysis by the commentator is distributed in the form of comments upon individual sections (articles) of the Constitution, has its handicap. In order to get the full benefit of a commentary, a reader must be at least roughly familiar with the distribution of material in the text of law commented upon, in this case with the system of the Soviet Constitution. This is hardly the case with a foreign reader, especially an American one.

There is an excellent general Introduction (*Einleitung*) dealing with the development of the Communist Party in the Soviet Union and the Soviet Union itself. But 44 pages out of a total of 421 is perhaps too short a space to cure the above mentioned handicap.

The reviewer strongly wishes to reiterate that the book is an excellent contribution, yet being a commentary, it is more a book for study and reference than for straight reading. He wishes the author would use the same material for presenting an outright treatise on the Soviet Constitution in which he would not be bound by the system of the Soviet Constitution but solely by his own system of presentation of material, for which he is so well qualified.

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MEGARRY, R. E. *Miscellany-at-Law.* London: Stevens & Sons Ltd., 1955. Pp. 415.

"My real hope," says the author in the Preface, "is that this may be thought primarily a book of legal wit. Not all law is dull nor all lawyers solemn. Far removed from that type of 'humor' which sometimes precedes 'laughter in court,' there is a type of verbal felicity endemic in the law which lifts many a page of the law reports into the realm of literature; and I have sought to collect some examples of this." The superb art of the author consisted in cementing together such quotations into readable, delightful essays.

The "cement" is often in the form of sharp yet graceful quotations from the author himself, which he attributes to one Ben Trovato. This reminds one of the charming short pieces composed by Fritz Kreisler which the great musician

played for years as if they had been compositions of long forgotten Italian masters like Pugnani, Porpora, and others: when the harmless deception was discovered by a studious scholar, Kreisler explained to a correspondent of the New York Times: "I found it inexpedient and tactless to repeat my name endlessly on the programs."[1]

This little volume is highly recommended to comparative lawyers, not only because the British and American material may lend itself to a study of the differences and similarities of wit in these two great jurisdictions, but because an evening or two with this book will undoubtedly extend the life expectancy of the student. If kept on the reference shelf rather than near the fireplace, the book will also help the reader to find epigramatic turns to express thoughts hard to formulate. *Difficile est communia proprie dicere.*

"The author has long been Assistant Editor of *The Law Quarterly Review*, and Reader in Equity in the Inns of Court. He is a member of the Lord Chancellor's Law Reform Committee and of the Incorporated Council of Law Reporting, and has been consultant to the B.B.C. for the 'Law in Action' series of talks from its inception."[2] Notwithstanding these high offices, the book is anything but dull, and the author is not solemn.

JOSEPH DACH

[1] New York Times, February 8, 1935; 1: 2.
[2] From the jacket of the book under review.

O'CONNELL, D. P. *The Law of State Succession.* Cambridge: Cambridge University Press, 1956. Pp. xi, 425.

O'Connell treats a controversial subject in a very pertinent and courageous way. Instead of stating with resignation that no uniform practice has evolved concerning many aspects of state succession, he ventures to lay down the law as it ought to be—and as it is actually confirmed by a number of cases. The author does not attempt to deny the fact that at certain occasions the rules he proposes were not followed—but he adduces convincing evidence why these cases should not be considered as precedents. O'Connell is right in holding equity as the key to state succession, i.e., in proposing to solve all the problems arising out of state succession on an equitable basis. In view of certain tendencies to do away with such "antiquated" notions as, for instance, the respect for acquired rights, it is comforting to see that O'Connell treats such rights with due respect. O'Connell sums up his work with a proposed code of rules on state succession. I am glad to see, that insofar as these rules are concerned with problems of citizenship, O'Connell does share my view that—contrary to the thesis of H. J. Jellinek—there exists no rule of international law, whereby persons in ceded territory automatically acquire the citizenship of the successor state. The main topic of the book is British practice concerning state succession. A lengthy appendix (128 pp.) contains relevant British diplomatic correspondence and legal opinions by the Law Officers to the Crown up to 1900. The book itself, however, discusses also the most recent cases of state succession. It is regrettable, that the

excellent book by Krystyna Marek, Identity and Continuity of States in Public International Law (Geneva 1954), was not brought to the author's notice. As O'Connell treats the occupation of Austria in 1938 as a case of state succession (although these facts may also be seen in a quite different light), he would have found the parallel material on Austria's post-1945 endeavors to disengage herself from the German hold equally interesting for his study. It is, however, true that publications of such material outside Austria are fairly scarce, and even there it is hidden in collections of cases which up to now lack a workable key. These few critical remarks, however, are by no means intended to belittle a very thorough book on a highly topical subject, proposing intelligent solutions supported by ample case material and equitable considerations. The fact that the book is written in an excellent style and is subdivided in a very pertinent way still increases the practical value of what, for years to come, will be considered the standard work on the subject in English.

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MAYERS, L. *The American Legal System*. New York: Harper and Brothers, 1955. Pp. ix, 589.

Written for college students, this book is also valuable for foreigners interested in the administration of justice in the United States. Despite the title, the work does not actually deal with the entire "American legal system." Very few pages are devoted to the common law and the authority of precedents. The organization and even the legislative powers of Congress and State legislatures, the powers of the President, the governors, and the administrative commissions, are outside its coverage, as is statutory interpretation. The achievements of the American Law Institute are referred to in one page and two footnotes. It is striking to note that not twenty pages of common matter are to be found in Shartel's *Our Legal System and How It Operates* and in Mayer's *The American Legal System* (the former's coverage being also, it is true, open to discussion). The subtitle, in fact, is more accurate than the title: the book is a description of "the administration of justice in the United States by judicial, administrative, military, and arbitral tribunals."

Within its scope, this book is an excellent one. It provides a comprehensive, accurate, and lively exposé of the machinery of justice in the United States. Such an exposé, to the writer's knowledge, could not previously be found in any other single book. The reader will find here what he could have gathered only after a painful search among various sources, a search nearly impossible to conduct from a foreign country. While a little more than two thirds of the work is devoted to the judiciary, it deals also with administrative tribunals, military tribunals, voluntary arbitration tribunals, and the control by the courts of all these jurisdictions.

In treating the courts, the author does not restrict himself to the institutions: the structure, powers, and personnel of state and federal courts. He shows how the machinery works, devoting two hundred pages to criminal proceedings

(investigation and prosecution) and civil proceedings (objectives and procedure). Finally, he delineates the philosophy of the functioning of the courts—as a check on the executive, a check on legislation, and molders of the law (titles which are not logomachy, but give a moderate and well-balanced treatment of the place of the courts in the American constitutional system). If a regret may be expressed, it will concern the small space devoted to the practical working of the full faith and credit clause as far as judgments are concerned and even (ten lines on p. 262, and p. 361) to the application of state law by federal courts. These are questions which always rouse the curiosity of foreigners and on which they may have difficulty in finding a clear exposé. On the other hand, the relatively long treatment of criminal and civil proceedings will be most valuable for them. It is a field of law in which the choice was between specialized and somewhat bulky books and some sketchy pages in summaries of American law. They will now find in Professor Mayers' work a comprehensible and satisfactory treatment of the matter.

The accuracy and lively character of the book also deserves praise. What makes it of special value to a foreigner is that it is written by a professor of law for laymen, i.e., college students. The author, therefore, with a perfect knowledge of law (and under the supervision of such specialists as the late Professor George H. Dession on criminal justice, Professor Bernard Schwartz on administrative justice, Mr. J. Noble Braden and Dr. Martin Domke on arbitration), has made an effort to be as concrete as possible, to answer any question which would be asked by persons not familiar with the administration of justice. Chapter 12, on the personnel of the courts, is a good example of the manner of the author. It is true that this manner is not without drawbacks. The Justices of the Supreme Court may not feel over-praised (the last paragraph, particularly, expresses regret that more of them in the past have not been impeached, a regret which may not appear the fair conclusion to a study of the Justices). The same may be said of the treatment of the lawyers, who appear torn between their conscience and their profession. On the whole, however, the picture is fair, accurate, and colorful. Furthermore, it is not only a picture of the present machinery of justice; whenever necessary, it explains the past and it expresses judgments and reports or makes suggestions on the way improvements could be made.

At a time when, again, the judiciary of the United States attracts the attention of the world, this book should be highly recommended. It will help the foreigner to understand the "third power" and its place in American constitutional life, a place unparalleled in other nations.

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DIAZ DE GUIJARRO, E. *Tratado de Derecho de Familia*, Volume I, Buenos Aires: Tipográfica Editora Argentina, 1953. Pp. 599.

In this comprehensive treatise on family law in Argentina, the author presents a new and fruitful approach to expound, analyze, and evaluate the family

as a unit—a unit derived from its biological and sociological nature as well as from its legal structure. The work is not limited to the Civil Code,[1] its amendments and related statutes of similar nature, but seeks to cover all fields of law which have any bearing, however slight, on the legal position of the family, including references to constitutional law, commercial law, social security, workmen's compensation, wages and hours law, penal law, procedural law, taxation, and military law, relating to the determination of rights and duties of the members of the family *inter se* and with reference to third parties. In the classification and distribution of the materials, certain basic principles facilitate this all-inclusive approach to the study of the family, providing a place for each aspect of this extremely complex institution. In addition, the most recent and important developments of civil-law theory in this specialized field are analyzed, largely in accordance with the teachings of Antonio Cicu, whose contributions have led to a fruitful revision of the classical studies of the French, Italian, and Spanish jurists. This follows the worthy Latin-American tradition, which, by collating, analyzing, and evaluating the continental doctrine, has done so much to enrich Latin-American law.

This is a treatise where the traditional civil-law technique is at its best. The comprehensiveness of the treatment, the conscious effort to generalize particulars to the essential, the careful analysis of the multilateral implications of bilateral legal relationships, the emphasis on systematic coherence with the basic logical presuppositions of the work—all these make this book an outstanding treatise on family law. This is the more remarkable as the author, realizing the significance of biological and sociological data in this field, has sought to coordinate and unify these "extra-legal" materials with the analytical contributions of civil-law theory. Common-law lawyers interested in current civil-law developments in the field of family law will find this book most instructive and valuable.

The present volume covers: (a) the family and its legal regulation; (b) family status (*"el estado de familia"*). In the first of these parts, a wide range of important subjects are studied, the biological and legal family links, acquisition of family status, the main features of the family from biological, ethical, economic and legal standpoints; its historical development to modern times, including the peculiarities introduced by the communist, fascist, and nazi regimes; the various types of legal norms applicable to the family, including the important contributions of foreign legal systems. A lengthy chapter is devoted to the concept of the family under Argentine law, bringing together parts of a picture which heretofore had not been placed in proper perspective. In the second part, the author makes an equally skillful and detailed analysis of the main features of family

[1] F. H. Lawson, "A Common Lawyer Looks at the Civil Law," University of Michigan Law School, 1953, p. 61, sagaciously remarks that civilians are inclined to include in their civil code only that which is likely to stand for a very long time. Thus, the civil code becomes a kind of constitution for private law. Hence, we add, unfortunately too often, civilians are inclined to give little importance to norms which are not a part of their own civil codes.

status. An Appendix sets forth the Spanish version of modern constitutional provisions relating to the family.

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SCHÖNKE, A. *Einführung in die Rechtswissenschaft.* 6th edition by Schranke, Werner. Karlsruhe: Verlag C. F. Müller, 1955. Pp. xi, 275.

REINACH, A. *Zur Phänomenologie des Rechts. Die apriorischen Grundlagen des bürgerlichen Rechts.* München: Kösel-Verlag, 1953. Pp. 226.

HUSSERL, G. *Recht und Zeit. Fünf rechtsphilosophische Essays.* Frankfurt am Main: Vittorio Klostermann, 1955. Pp. 225.

HARTMANN, N. *Philosophische Gespräche.* Göttingen: Vandenhoeck & Ruprecht, 1954. Pp. 80.

Schönke-Schrade is the sixth edition of an introduction to legal science, the first edition of which was published in 1946. The book well deserves such phenomenal success, though it introduces its readers to German law rather than to legal science in general. As such, it will prove exceedingly useful in the hands of foreign law students looking for reliable information about the main features of German law. The authors themselves try to look at this law from without, and their book includes many comparative and historical remarks serving this purpose of significant comparison. Statistical figures, sparingly given, are also welcome. Extending to a thorough appraisal of the Civil Code, constitutional and administrative law, criminal law, procedure, bankruptcy, and international law, the book must be considered as a success in selecting what is essential and in omitting what can be omitted. Frequent addition of illustrative cases decided by German Courts is a welcome feature of this eminently readable small volume.

Reinach, who was killed in action during the first world war at the age of 34, the other war victim of German philosophy beside Lask, is well known for his aprioristic legal phenomenology. His book is by no means easy to read, nor is his basic idea generally accepted. Its reappearance is a sign of revived interest in the most abstruse and hardest problems of legal thought. For Reinach speaks of legal things quite independently of both positive and natural law, independently also of physical nature, of psychological experience, and even of moral experience or values. He puts this problematical realm of legal being (*Sein*), which has its own essential laws (*Wesensgesetze*), evident and unalterable, on the razor's edge of *social acts*. Thus, claim and obligation, promise, rights, ownership, and representation are discussed at great length. It is quite curious that he considers juridical personality a fiction which cannot be eliminated by means of express endowment, that is to say, which not even law can turn into existence. For it is quite impossible to bestow personality on entities which have no personality of their own (210). This depends of course on what is understood by person, but it is a good example of the author's "essential laws" with which it is quite possible to disagree.

Reinach carefully distinguishes his own aprioristic legal theory from both

general theory of law and natural law doctrine. As to the latter, he pretends that one of its basic endeavors was the discovery of a sphere which has eternal truth exempt from the influence of the manifold positive laws. This postulate has been fulfilled, he thinks, by his own theory. But the legal interrelations thus discovered are no 'Law' as yet in themselves. Reinach concludes on the desperate tone that neither 'Law' nor 'Nature' are what natural law doctrine, or indeed his own, really have in mind.

The obvious question in face of such conclusion is to ask what is law and in what sense is this theory legal if it is not about law? These questions proved indeed fatal to Reinach's theory at the time it first appeared in 1913. Yet, what is still vibrant with significance and still new in it is precisely his constant concern with what positive law still can do and what it can no more do, where does it find its limit, and to what extent do these limitations still operate or do not operate any more.

The reader of Gerhart Husserl's book may appreciate what has become of legal phenomenology by 1955. He speaks of the reception of foreign law as an example of making law timeless (*Entzeitung*). He thinks the classical example is the Roman *ius gentium* as a system of legal ideas distilled by way of reducing the ideas of a given legal order to their sense kernel (*Sinneskern*). The common law never made such a claim, he asserts. This timeless law is understood, not as a kind of higher law, but as legal *truths* which have no normative force (14). One of the significant conclusions is that no order may remain unchanged when what is ordered by it undergoes essential change (26). A claim as well as other "pure" legal states of things (*Rechtssachverhalte*) are characterized as a kind of foreign bodies in the reality experienced in the daily intercourse with the things of our environment. This is because they have no historical time structure and have no part in the flow of lived time (40). If these remarks are at least challenging, the childish classification of executive, legislative, and judicial power in parallelism with the man of the present, the future, and the past, is little convincing. And many of the "apriori legal truths" are in the same category.

In his essay on legal experience Husserl compares that of the layman, the learned jurist, and the judge among themselves and, finally the judge's final experience (rising to *res iudicata*) with mathematical evidence. He thinks the theoretician does not speak the last word either in law or in art. The trouble is that the learned jurist feigns by way of abstraction an object not to be found in social reality, because he handles a part as if it were the whole (77). Thus, there is a latent reference from the layman's experience to that of the learned jurist, and from here to that of the judge who unites within himself both experiences in a final kind of evidence.

Perhaps the boldest attempt made by Husserl to explain objectivity in law and the legal process is by way of interpreting them as a kind of reproduction which reacts on what has happened. That such a thing occurs is shown by the example of the reproduction of a symphony or drama. To these, statesmanlike acts are assimilated, whose meaning undergoes essential change (*Wesenswandel*)

in the course of history. This is applied to a case of murder the facts of which are revived at trial. The sense kernel (*Sinneskern*) and the consequent penal sanction of the incriminated facts constitute a single whole which the murderer left unfinished when he committed the act (173).

The last essay is about Sacrifice, Crime and Punishment. Husserl's problem is whether punishment inflicted on the offender may be interpreted as a kind of sacrifice he is invited to make in order to bring him back on the right road? Intervention by the community, provided it is no dictate but mere justice, does not deprive the convict of responsibility for the acceptance of sacrifice, so that there must be no essential difference between a man who voluntarily atones his crime and one who suffers the pain of punishment (196). The author is aware of the dismay and repulsion this interpretation is likely to cause to jurists. He tries to alleviate displeasure by lengthy elaboration, assimilating crime to gambling and betting, as if the criminal had forfeited his chances. This elaboration is unlikely to dissipate the doubts of the legal profession. There is marked deterioration of phenomenological analysis, especially in the last essay, and much that reads as a turn towards existentialism.

This is precisely the point of interest for criticism. Phenomenology which has been characterized (by Haesaert) as the return back to the age before criticism, appears to show little resistance against encroachment by the intuitive-irrational, subjective-poetical moods of existentialism.

It is from this point of view that Nicolai Hartmann's Philosophical Talks, which he had conducted during two semesters in his seminar with various participants, and which have been published according to extant records, are of some interest. On account of their subject-matter (Prudence and Truth, The Claim of Poetry to Truth), they are only of remote interest for lawyers.

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Book Notices

UNESCO. *Thèses de sciences sociales. Catalogue analytique international de thèses inédites de doctorat, 1940–1950. Theses in the Social Sciences. An International analytical catalogue of unpublished doctorate theses, 1940–1950.* Paris: UNESCO, 1952. Pp. 236.

The purpose of this publication, as well as its scope and its method, are clearly outlined in the preface written by Dr. J. E. Godchot, apparently its main author.

The Catalogue lists, as broadly as possible, the unpublished doctorate theses written during the years 1940–1950 on social science subjects in 23 nations, including the United States. The impact of war on the publication of theses increases the value of this Catalogue. While in France, for instance, all theses used to be published before the war and, therefore, could easily be found in bibliographical books, the scarcity of paper obliged the government, in 1940, to authorize the presentation of mere typed theses and, due to the increased price of printing, the previous requirement to print was never reimposed. No general catalogue, therefore, has been available in France, even for French theses, before this publication. The situation is even worse as far as certain universities in France or elsewhere, are concerned; due to war destructions, even these have sometimes been unable to ascertain the theses presented to their faculties.

The present Catalogue is divided into ten chapters dealing with Sociology, Social Psychology, Population, Demography and Human Geography, Political Science, Economics, Law, International Law and Relations, Administrative Sciences, Education and Cultural Anthropology and Ethnology. Each chapter may itself be divided into sections, in which the various theses are listed by nation and, within each nation, by alphabetical order of the names of the authors. The title of the thesis, the name of the university and of the department of the university, the grade obtained, the language, the year, the number of pages, are usually given under each name.

The publication also contains various indexes: a detailed table of contents, a concordance index between the Universal Decimal Classification and the headings adopted in the catalogue, two alphabetical subject indexes—one in French and another in English—an alphabetical list of authors, a geographical index, and a table of languages.

The interesting preface by Dr. J. E. Godchot, not only explains the purpose and the method of the Catalogue, but gives useful information on the doctorate degree within the various nations.

This publication is the result of a great effort and will undoubtedly avoid painful researches for many scholars. Its author deserves praise and gratitude.

ANDRÉ TUNC

HEGI, R. *La Nationalité de la Femme Mariée.* Lausanne: Imprimerie la Concorde, 1954. Pp. 124.

This small book gives a valuable account of the many answers to the problem how marriage influences the nationality of the woman. Unity of the family and equality of husband and wife are the two antagonistic principles, and it is between these extremes that the legislators have graded their solutions. However, the reading of Mr. Hegi's thesis suggests some remarks.

1. It is a well-known rule that a state cannot dispose of the nationality of another state. A Soviet statute of 1938, repealed in 1947–48, but re-established

in 1953, provides that the marriage with a foreigner has no influence on the nationality of a citizen of the USSR (p. 53). Is such disposition really without effect, or could it mean that, at least within the frame of private law, the official agencies of the Soviet state will completely disregard the foreign nationality its citizen has acquired by marriage?

2. One might be led to think that, perhaps contrary in this respect to domicile, nationality is a unique concept. (The rules governing nationality may vary from state to state—*jus soli*, *jus sanguinis*, etc.—but the definition remains the same). However, Uruguay, for instance (the United States also, in a way), proves that this is not the case (pp. 37 and 107). Uruguay distinguishes between "nationality," "natural citizenship," and "legal citizenship." What notion should then be used if a certain rule of conflict refers to the *lex patriae*?

3. Argentina must be one of the very few countries where a foreign husband takes more easily the nationality of his wife than the wife the nationality of her husband (p. 60).

4. Syria gives a nice example of racial or religious discrimination: marriage with a Syrian extends Syrian nationality to the foreign woman of Arabic origin only (p. 77).

In a short appendix, Mr. Hegi completes his work with a study of the nationality of children born from "mixed" marriages.

J.-F. AUBERT

SAROT, J. *Conseil d'État, Répertoire des Arrêts et Avis de la Section d'Administration, 1948–1953.* Bruxelles: Établissements Émile Bruylant, 1955. Pp. 432.

It was not until the law of December 23, 1946, that the Belgian *Conseil d'État*, a consultative authority as well as an administrative court, was created. Previously, in some instances public administrative authorities could be held responsible for acts in connection with their activities by the regular courts. The greater part of the activities of public administration, however, were not subject to any judicial control.

According to the law of 1946, the Belgian *Conseil d'État* is composed of two sections. One acts as an advisory board to the executive on draft bills of the legislature, on drafts of executive decrees and other rules and regulations of a general character. The second (*Section d'Administration*) functions as an administrative tribunal, and it is the decisions of this section which are surveyed in the present book.

The author, an official (*greffier adjoint*) of the Belgian *Conseil d'État*, states in the foreword that his intention was merely to compile a book of reference. As the *Conseil d'État* of Belgium rendered more than 3000 decisions during the years 1948 through 1953, it is of some importance for research as well as for later developments of jurisprudence to make this material available. The main part of the book is a summary of the opinions and the decisions of the Administrative Section of the Belgian *Conseil d'État*, presented in alphabetical order in almost 200 pages. It is a real encyclopedia of the highly diversified subject matter dealt with by the court. The summary is complemented by a short systematic survey of the competence and the work of the *Conseil d'État*.

The various chapters of the book treat suits for restitution of damages caused by acts of public administration; suits for transgression of official authority (*excès de pouvoir*); specific cases in which the *Conseil d'État* substitutes its own judgment for a reversed administrative decision; and jurisdictional disputes between administrative authorities. A chapter deals with the specific rules of procedure of the *Conseil*. It must be noted that in suits for damages, the *Conseil d'État* has authority only if the case in question cannot be decided by a regular law court. Moreover, in these

cases the competence of the *Conseil* is restricted to giving an opinion to the authorities of public administration to whom the final decision is reserved.

The usefulness of this work is greatly increased by a bibliography of works on the activities of the *Conseil d'État* and of the more important earlier treatises; a chronological table of decisions; and an alphabetical index. Although the author modestly labels his book as a practical handbook, it will be of great value to those interested in the scientific development of Belgian administrative law.

IMRE NEMETHY

CHAPMAN, B. *L'administration locale en France.* Paris: Librairie Armand Colin, 1955. Pp. 257.

The author, an Englishman, published this book originally in 1953, in English, under the title, "Introduction to French Local Government." The present French version is the translation of this book.

The author makes an interesting comparison between the present French local government and that of Great Britain in the Middle Ages. Present-day France, with the exception of a few large cities, is comparable to medieval England, which was predominantly an agricultural country in the Middle Ages, with a population dispersed in small villages. The medieval decentralized British administration on two levels of local government, the county and the hundred, controlled by the local representative of the crown, is comparable to the present French administration, decentralized in the *départements* and the *communes*, in which the representatives of the national government are the *préfet* and the *maire*.

In the subsequent chapters, the author elaborates the composition, organization, and competences of the *Conseil Municipal;* of the *Conseil Général;* of the *Commission Départementale;* and the various questions connected with the administration of cities, villages, and *départements*. Throughout, the responsibilities and authorities of the various administrative organs, for instance that of the *maire* (mayor), the checks and controls exercised by the superior administrative organs, and the financial problems of the various *départements* and *communes*, as well as the administration and government of the region of Paris, are discussed. Due attention is given to the influence of the French *Conseil d'État* on the activities of the lower administrative tribunals as well as on the entire French administrative law and governmental policy. In the conclusion, the author makes a number of critical remarks regarding the values as well as the deficiencies of French local government. The comparative aspects of this book are especially well accentuated by the fact that the author, not a Frenchman, remained apparently uninfluenced by the inveterate views of French authors. Nevertheless, the description and explanation of French local government given by Mr. Chapman is highly readable, clear, and up to date.

IMRE NEMETHY

STONE, J. *Legal Controls of International Conflict.* New York: Rinehart & Co., Inc., 1954. Pp. lv, 851.

The present book is a comprehensive inquiry into the law of international disputes, war, and neutrality. In the author's words, it is "first and foremost a treatise, that is, a systematic, documented account of the traditional law." Its aim, however, is to go beyond the scope of a usual treatise. The dissatisfaction with the incongruity between international law and the actual conduct of interstate relations led Professor Stone to give his book a novel structure. The twenty-six chapters in which he exposes the traditional law are accompanied by thirty-four "discourses," where he examines the forces which threaten the traditional system. Problems such

as atomic weapons and international law, the contemporary crisis of neutrality, and the postwar repatriation of unwilling prisoners are dealt with in the discourses.

Professor Stone is to be congratulated for having accomplished this huge work. It is an extremely valuable contribution to international law not only because it is one of the very few complete treatments of the laws of war and neutrality since World War II but also because of its new approach and its excellent documentation. The division of the book into chapters and discourses may be criticized because it sometimes disrupts the treatment of connected problems and interrupts the easy procession of the reading. It has, however, the advantage of calling special attention to current topics. In fact, the discourses form a symposium on modern problems of the law of disputes, war, and neutrality.

The first 64 pages of the volume, entitled "Perspective," are devoted to a broad survey of the growth of international law and the various legal schools. Though written with much imagination, they are somewhat misplaced in this book. The scope of the questions which are raised in this section seems to be too wide for this book, whereas the treatment is too brief for a full exposition. The ideas presented in this first part, however, would be well suited for a separate book.

DIETRICH SCHINDLER

PHILLIPS, O. H. A First Book of English Law. London: Sweet and Maxwell Ltd., 1953. Pp. xxiv, 293.

Intended as an elementary introduction to the study of English law, there is much in this volume to commend it to knowledgeable common lawyers, not to mention continental practitioners whose training has lain beyond the Anglo-American pale. Following a brief survey of the chief characteristics of English law, an account is given of the various systems of courts, their composition and jurisdiction, their origins and history, and significant judicial precedent. The sources of English law are discussed in a section that seeks to explain the role of statutes, custom, legislation, and decisions in British development. General principles are then considered, especially those in the important fields of criminal and tort law, property and contract law, and the law of persons. A table of statutes of prominence, a table of important cases cited, a chart of dates of sovereign accession, and an index are included.

A handbook of this nature would appear to be of inestimable value to anyone in any way concerned with fundamental methods or issues in English law. The not inconsiderable treatment accorded specific problems, particularly those which arise with the greatest frequency, will no doubt provide all that is necessary in the determination of certain questions. The broad coverage that the book provides will, on the other hand, more than adequately fulfill the purposes of the academically inclined who would seek an understanding in comparative terms of the entity that is the English Legal System.

HILLIARD A. GARDINER

GRIFFITH, E. S. *Congress: Its Contemporary Role.* New York: New York University Press, 1956. Pp. xi, 207.

PATTERSON, B. B. *The Forgotten Ninth Amendment.* Indianapolis: The Bobbs-Merrill Company, 1955. Pp. ix, 217.

Griffith's book seeks to assess in broad outline the function of Congress. This body is depicted as engaged in battle against communism, special interests, and a potentially dangerous bureaucracy. A continuing process of adjustment is thus necessary in order that the more general national interest and welfare may be represented.

The central problem of executive-legislative relations with which the study is concerned involves the interaction of representative government with bureaucracy's specialized tech-

nical competence. In sixteen chapters treating of diverse aspects of government in the United States, the author makes some telling points. On the constitutional position of Congress, it is noted that transformation is taking place more by reason of changing usage and custom than by formal amendment. On the separation of powers, as a consequence of which there has arisen a struggle between the Presidency and Congress, there is set forth a list of the weapons available to each of the two branches. Congress's role as an overseer of the administration is deemed highly important, although the extent of its proper control is concededly arguable. In international policy and indeed in all other functions of Congress and government, the availability of staffs of great competence to explore alternatives, to analyze executive presentations, to aid in the organization of hearings, and to provide unbiased, thorough information expeditiously, is stressed as important. British Parliamentarianism is contrasted; the author finds there a bureaucracy maturing almost all legislation and increasing by leaps and bounds, a two-party competition over marginal group support through promises of governmental largesse, and a sacrifice of independence of thought and action on the part of the individual M.P. The concluding note is one of hope: the role and responsibility of Congress in the years ahead is the safeguarding of responsible executive and representative legislative principles, the preservation and fostering of the vitality of our states and localities along with our dispersive economic groups, and intervention in the national and world interest when the occasion demands.

The second volume voices a clarion call for legislative and judicial recognition of rights under the social conditions of today and seeks to establish that the Ninth Amendment is a basic statement of the inherent natural rights of the individual, a declaration in favor of individualism, the cardinal virtue of democracy. It is contended that this Amendment has been robbed of its meaning through an erroneous classification as a restriction upon the power of the Federal Government, when in fact it is a fundamental declaration of human rights, a covenant between our Government and the individual in regard to personal liberties. The text traces the legislative history of the Ninth Amendment, and argues that it is a mere assertion that while certain enumerated rights have been expressly protected by the Constitution, reservation therein should not be taken to deny or disparage any unenumerated right not so apparently protected. A chapter is devoted to judicial construction of the Ninth Amendment in which it is urged that the Ninth is not a part of the Bill of Rights that has been held to be restrictive upon the Federal Government; that there have been few decisions in which the Ninth Amendment's meaning has been defined; that the interpretation of the Ninth is still an open question; and that there are no decisions which are not in agreement with the theory that the Ninth is the basis for protection of rights of natural endowment on a universal plane. The Ninth Amendment is deemed applicable to state governments; as the Federal Government has no power to destroy human liberties, the state governments are similarly unempowered. While the unenumerated rights are not exactly defined, the Supreme Court has been giving some substance to them in its interpretations under the due process clause. Along with the Ninth's guarantees of our individual personality, there are duties and obligations, the exercise of which are imperative that democratic government may be sustained.

Important state papers and public documents are quoted from the annals of Congress, as are numerous court decisions in the attempt to document the author's thesis. In place of relegation of the Ninth Amendment to a

lumber room of outworn juristic or political ideas, natural law and natural rights as believed in by the founders of our polity are presented as effective political and legal instruments of today.

HILLIARD A. GARDINER

SPARKS, B. M. *Contracts to Make Wills.* New York: New York University Press, 1956. Pp. 230.

By definition, a contract results in a legal obligation, whereas a will is ambulatory and revocable until death. This suggests the question whether or not one can contract to do a revocable act. As Professor Sparks' thesis clearly indicates, many of the legal consequences attending a contract to make a will can be properly analyzed if it is characterized as a contract, but with the will affording the means by which the promised performance is to be accomplished.

No doubt the fusion of contract and testamentary concepts by both the draftsman and the court has led to the adoption of unsound rationale. The legal status of promisor and promisee prior to performance is often loosely characterized as analogous to the trust, or to the life tenant-remainderman relationship. This fusion has created serious substantive and legal problems, particularly in probate proceedings and in the determination of the rights of creditors.

Resort to contract principles may solve questions relating to the formation and essentials of the agreement, or to legal and equitable remedies. But adherence to contract law will be of little aid in solving the legal status of the promisor and promisee, especially when the former has not agreed to devise a particular thing, but only an indefinite portion of his estate. Adequate protection against dissipation of the estate by the promisor who repents the contract must often be worked out as the situation arises. Nor will contract law solve the plight of the destitute spouse who asserts a marital claim, for a different social policy is involved.

One may seriously question whether the theory is as important as the result in the particular case. The device of the contract to make a will is more often employed by those who are laymen and who occupy a close filial relationship rather than by commercial interests. Certainly the former have little realization of the magnitude of the family squabbles that can arise. The court may often be forced to act as the protector and father confessor in an area where definite standards of legal conduct are less important than reaching an amicable settlement.

Professor Sparks' significant contribution lies in the clarity with which these problems are brought to focus. Equally noteworthy are the helpful suggestions to the practitioner who is faced with difficult problems of expressing the intention of the parties or in prosecuting a client's claim. Properly utilized, the contract to make a will can serve as an effective estate-planning device for the aged, as a tool in property settlements made before marriage or during divorce or separation proceedings, and occasionally as an instrument to govern the relationship between corporation and stockholder, master and servant, partnership and partner.

GUST A. LEDAKIS

SOMERS, H. M.—SOMERS, A. R. *Workmen's Compensation: Prevention, Insurance, and Rehabilitation of Occupational Disability.* New York: John Wiley and Sons, Inc., 1954. Pp. xv, 341.

The accomplishments as well as the failures of workmen's compensation are detailed in this survey and analysis, utilizing historical, economic, legal, medical, and comparative materials. Within the United States and its territories legislation is shown to have been adopted universally over a period of thirty-seven years, although not all jobs are covered. That the compensation program can make possible a

cohesive and continuous medical and maintenance program for the injured worker, leading to maximum physical adjustment and a return to economic productivity at highest capacity is an underlying theme. But the fact that the present agglomeration of law on the subject is a source of much chaos is also made clear: in the area of work injuries, the accidental variations in treatment are very great, with undue generosity for some and cruelty for others. It is possible, for example, that survivors of a fatally injured worker, who are eligible for workmen's compensation death benefits, OASI survivor benefits, and benefits from one or more collectively bargained group insurance plans, may be entitled to considerably more than the total wage loss suffered, while there is, on the other hand, the continuing fact that many workers have only the protection of an ordinary suit at common law or meager compensation benefits. The constitutional guarantee of "equal protection of the laws" is impliedly far from real in this respect.

Workmen's compensation costs American employers about $1.3 billion a year. It is a major source of support for the families of about 16,000 workers who are killed at work each year and a large proportion of the two million who are injured—compensating nearly 400,000 beneficiaries each week, and forms a source of livelihood for thousands in the professional fields. As a subject of public policy debate at almost every session of the forty-eight State legislatures and of prodigious litigation at every judicial level, its continuing importance is inescapable. The Somers have ranged over all of the relevant literature in presenting this scholarly work, one which fills a long existent need for a central source of operational data on the subject.

There are many graphs and charts reflecting injury rates, court recoveries, statutory enactments, workmen's compensation benefits, compensation and benefit payments, and operating costs of the program in the text. The appendix surveys the Federal Employees' Compensation Act, The British Industrial Injuries Insurance System, The Ontario Workmen's Compensation System, and the Federal Employers' Liability Act provisions for Railway Workers and Seamen (Jones Act). The present British method of compensating for industrial injuries is a departure from the older workmen's compensation system: in place of a liability imposed solely on the employer, secured by private insurance and enforced chiefly by legal action, there has been substituted a compulsory state insurance system, financed by contributions from employers, workers, and the state, and administered by the same authority responsible for other social insurance programs, the Ministry of National Insurance. The Ontario act, like the United States laws, substitutes the principle of liability without fault for individual employer liability based on negligence and provides for coverage through an exclusive state fund. Its most widely cited characteristic is the complete denial of the right to court review, thereby giving final authority and much greater independence to the administering agency than is common in United States jurisdictions.

HILLIARD A. GARDINER

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